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IN THE

Supreme Court of the United States

BARNES-JEWISH HOSPITAL, ET AL.,
AND MARK D. ROBERTS, ET AL.,
Petitioners,

v.

METROPOLITAN ST. LOUIS SEWER DISTRICT, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Beatty v. Metropolitan St. Lewis Sewer District*, 867 S.W.2d 217 (Mo. banc 1993), the Missouri Supreme Court held that a Metropolitan St. Louis Sewer District ("MSD") rate increase violated Article X, § 22(a) of the Missouri Constitution because the increase was implemented without voter approval. The present class action was filed in order to recover the approximately $39,700,000 wrongfully collected by MSD. The following questions presented arise from Petitioners' attempt to object to the class action settlement reached between the representative class plaintiff and MSD:

1. Whether the State of Missouri's requirement that unnamed class members in a Mo.R.Civ.P. Rule 58.08(b)(3) class action be granted leave to intervene in order to achieve appellate standing to challenge the approval of a class action settlement violates U.S. Const. amend. XIV, § 1.

2. Whether class representation was inadequate, in violation of U.S. Const. amend. XIV, § 1, where, in a case where liability was res judicata, the undisputed damages were approximately $38,300,000 and the Missouri constitutional provision at issue awarded plaintiffs their attorneys fees, class plaintiff nonetheless settled for approximately $30,140,000 in principal, less attorneys' fees to be paid by plaintiff of $4,521,000, and waived as much as $37,000,000.00 in prejudgment interest.

PARTIES TO PROCEEDING

Petitioners:

Barnes-Jewish Hospital Class Members:

- Barnes-Jewish Hospital
- Daimler-Chrylser Corporation
- Emerson Electric Company
- SSM Healthcare
- Unity Health System

and

Roberts Class Members:

- Mark D. Roberts
- Steven Oberg
- Gretchen Williams

Respondents:

Metropolitan St. Louis Sewer District
Robert A. Ring
6024 Washington Avenue, Inc.
Champ Spring Co.
Kickham Boiler and Engineering, Inc.
Viking Lodge and Restaurant, Inc.
Apartment Exchange, Inc.
Michael F. Kickham, Sr.

CORPORATE DISCLOSURE STATEMENT

Deutsche Bank AG owns 10% or more of the stock in Petitioner Daimler-Chrylser Corporation.

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JURISDICTION

The Missouri Court of Appeals, Eastern District, entered judgment in this case on December 5, 2000. Petitioners' Motion for Rehearing was denied on February 22, 2001. The Missouri Supreme Court denied

Petitioners' Application for Transfer on April 24, 2001. This jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States reads

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pursuant to SUP. CT. R. 14(f), the following constitutional provisions are quoted verbatim in Appendix E:

MO. CONST. art. X, § 22

MO. CONST. art. X, § 23

STATUTORY PROVISIONS INVOLVED

Pursuant to SUP. CT. R. 29.4(c), 28 U.S.C. § 2403(b) may apply. Pursuant to SUP. CT. R. 14(f), the following statutory provisions are quoted verbatim in Appendix E:

R.S.MO. § 512.020

MO. R. CIV. P. 52.08

MO. R. CIV. P. 52.12(a)

STATEMENT

This case involves a non-opt-out class action settlement for at least $12.6 million less than the plaintiffs' class is entitled to as a matter of Missouri constitutional law and under Missouri Supreme Court decisions having res judicata effect.

The Missouri Supreme Court held Respondent Metropolitan St. Louis Sewer District ("MSD") collected payments in the approximate amount of $39.7 million in violation of Article X, § 22(a) of the Missouri Constitution, in that it was not submitted to a vote of the people. *See Beatty v. Metropolitan St. Louis Sewer District*, 867 S.W.2d 217, 221 (Mo. banc 1993) ("*Beatty II*"). This class action suit, filed to recover the amount wrongly collected, followed.

Class plaintiffs nonetheless settled the present lawsuit for only $30,140,000. Further, approximately $4,521,000 was to be subtracted from the settlement funds to pay Plaintiffs' attorneys' fees, notwithstanding that Article X, § 23 of the Missouri Constitution requires MSD to pay Plaintiffs' attorneys' fees. The settlement additionally waived more than $17 million in prejudgment interest at the rate 5%, or nearly $37 million at the Missouri statutory rate of 9%.

A. MSD's Illegal Taxation

The MSD is a utility organized as a political subdivision of the state of Missouri that provides sanitary sewer, waste and storm water services in the city and county of St. Louis. (LF 18) It provides these utility services to approximately 420,000 customers and is, therefore, one of the largest utilities in the state of Missouri. (TR 156) MSD is self-regulated and thus not subject to the jurisdiction of the Missouri Public Service Commission or any other utility regulatory body. *Id.*

On May 13, 1992, MSD enacted Ordinance No. 8657, substantially increasing the residential and non-residential sewer service charges for one year in an attempt to generate additional revenue of approximately $40 million. (LF 18, 257)[1] The Missouri Supreme Court held in *Beatty II* that the 1992 rate increase implemented by MSD violated Art. X, § 22(a) of the Missouri Constitution because MSD did not seek the voter approval required therein. *Beatty II*, 867 S.W.2d at 221.

In *Beatty v. Metropolitan St. Louis Sewer District*, 914 S.W.2d 791, 795 (Mo. banc 1995) ("*Beatty III*"), the Missouri Supreme Court suggested that the proper method for MSD customers to recover the illegal charges, absent a refund from MSD, would be via class action lawsuit. The illegal charges, after MSD issued a partial refund by crediting delinquent accounts, totaled approximately $38,300,000. (LF 33, 257) (TR 43) On remand of the *Beatty* case, the plaintiffs therein received a one hundred percent credit of the illegal charges they paid. (TR 11) (LF 33)

B. The Plaintiffs' Class Representative Settled for Far Less than the Amount Due as a Matter of Law Under *Beatty II*

This case is the class action lawsuit suggested by the Missouri Supreme Court in *Beatty III*. Petitioners are two groups of dissenting class members. The first, the "Barnes-Jewish Hospital Class Members," are a group of corporate customers of MSD. (LF 311-15) The second, the "Roberts Class Members," are individual customers of MSD. (LF 340-41)

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[1] Pursuant to SUP. CT. R. 12.7, Petitioners cite to the legal file and transcript comprising a portion of the record before the Missouri Court of Appeals, Eastern District, below.

On or about August 27, 1999, the plaintiffs, MSD, and their respective counsel agreed to a settlement in which MSD would create a reduced refund pool of $30,140,000 from which the plaintiffs' attorneys would receive a fee in the amount of $4,521,000. (LF 39, 126) The remaining $25,619,000 amount would be distributed among MSD's 420,000 customers. (LF 44-48, 19) The settlement made no provision for the payment of prejudgment interest. (TR 107) Petitioners received no notice of the settlement negotiations. (TR 16)

On August 27, 1999, the trial court approved the Conditional Stipulation of Class Settlement ("Stipulation"). (LF 86-94) The Stipulation conditionally certified, on a non-opt basis, the class of all MSD customers who were charged for wastewater sewer service under Ordinance No. 8657 from July 1, 1992 through June 30, 1993. (LF 34-46, 41-44, 87-88) The trial court also scheduled a hearing on approval of the settlement for November 1, 1999 and directed the parties to provide notice of the proposed settlement and class certification directly to MSD's current customers and also by publication. (LF 87-89-90)

Petitioners, as members of the conditionally certified non-opt-out class, filed and served their written objections to the proposed settlement. *See* Appendix E, at A-124. Petitioners raised numerous issues in their objections and at the hearing held on November 1, 1999 regarding the fairness of the proposed settlement, including that the settlement amount was unfair and inadequate and that the award of attorneys' fees from the settlement fund violated Article X, § 23 of the Missouri Constitution. (LF 264-26, TR 152-56) Petitioners also moved to intervene in the case. (LF 311-316)

Plaintiffs' class counsel testified under cross-examination that he had previously demanded statutory interest at the rate of nine percent from MSD—an amount of about $25,000,000. (TR 401-406) Plaintiff's class counsel also stated he had a strong claim for prejudgment interest at five percent because in discovery he learned that MSD receives a five-percent return on its general deposits. (TR 105) One of the class representatives testified that the class sacrificed one hundred percent of the prejudgment interest claim. (TR 54-55) Prejudgment interest accrued through April 24, 2001 is approximately $17 million in at the rate 5%, or nearly $37 million at the Missouri statutory rate of 9%.

On December 21, 1999, the Court approved the settlement and denied the motions to intervene. *See* Appendix D. The Petitioners appealed the judgment to the Missouri Court of Appeals, Eastern District, which affirmed the trial court. *See* Appendix A, at A-3. The Missouri Court of Appeals held, inter alia, that because the trial court denied Petitioners' Motion to Intervene, Petitioners lacked standing to appeal the trial court's decision on the merits. *Ring v. Metropolitan St. Louis Sewer District*, 41 S.W.3d 487, 491 (Mo. App. E.D. 2000) (*Ring II*). The Missouri Supreme Court denied Petitioners' Application for Transfer on April 24, 2001. *See* Appendix A, at A-1.

REASONS FOR GRANTING THE PETITION

This action raises an important question of law upon which the United States Circuit Courts of Appeal are split: whether unnamed class members have standing to appeal the adequacy of the settlement where their motion for intervention is denied. According to the Missouri courts' decision in this case, Missouri Rule 52.08, which is identical to Fed.R.Civ.P. 23, provides that unnamed class members do not have standing to appeal the adequacy of the settlement unless they are granted leave to intervene. This is also the law under Fed.R.Civ.P. 23 in the Fifth, Sixth, Seventh, Tenth and Eleventh Circuits. Unnamed class members do have standing to appeal a settlement's adequacy in the Third and Ninth Circuits. Missouri courts' interpretation of Rule 52.08 violates due process rights under the Fourteenth Amendment to the United States Constitution because it denies the statutory right to an appeal.

This case also presents this Court an opportunity to rein in inadequate settlements in non-opt-out class action cases, in which the only winners are the attorneys for the representative class plaintiff. Class plaintiff's representation in this case was inadequate because the settlement needlessly compromised away between $17 million and $37 million in prejudgment interest in a case where liability was res judicata, while the class plaintiffs' attorneys received more than $4.5 million in fees from the settlement pool that the Missouri Constitution requires defendant MSD to pay. This, too, violated Petitioners' due process rights under the Fourteenth Amendment to the United States Constitution, as interpreted by, inter alia, *Hansberry v. Lee*, 61 S.Ct. 115, 311 U.S. 32, 85 L.Ed. 22 (1940).

I. Missouri's Requirement that Unnamed Class Members be Granted Leave to Intervene in Order to Achieve Appellate Standing to Challenge the Approval of a Class Action Settlement Violates Petitioners' Procedural Due Process Rights.

A. The Missouri Court of Appeals' Decision Ruled for the First Time Under Missouri Law that a Class Member Must be Granted Leave to Intervene in Order to Obtain Appellate Standing

Prior to the Missouri Court of Appeals' ruling in *Ring II*, Missouri law was silent as to whether objecting class members were required to obtain leave to intervene in order to have appellate standing to challenge the settlement. Missouri Rule of Civil Procedure 52.08 is identical to Fed.R.Civ.P. 23 and, accordingly, the Missouri court looked to federal precedent for guidance. *Id.*, at 490. The federal circuit courts are split on the question.

In the Fifth, Sixth, Seventh, Tenth and Eleventh Circuits, unnamed class members do not have standing to appeal the adequacy of the settlement unless they are granted leave to intervene. *See Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987). In the Third and Ninth Circuits, unnamed class members have standing to appeal absent intervention. *See Carlough v. Amchem Products, Inc.*, 5 F.2d 707 (3d Cir. 1993); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977). Under the Eighth Circuit precedent, a party must at least move for leave to intervene in order to have standing to appeal; it is not clear whether the motion to intervene must be granted in order for standing to exist. *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 507 U.S. 908, 113 S.Ct. 1251, 122 L.Ed.2d 650 (1993).

The Missouri Court of Appeals held that objecting class members did not "have standing to appeal the adequacy of the settlement agreement because their motions to intervene were denied." *Ring II*, 41 S.W.3d at 491. Per *Adams v. Robertson*, 117 S.Ct. 1028, 1029, 520 U.S. 83, 86, 137 L.Ed.2d 203 (1997), in their Application for Transfer to the Missouri Supreme Court, Petitioners raised their procedural due process challenge to the Missouri Court of Appeals' denial of standing. *See* Appendix E, at A-52. Procedural due process could not have been raised earlier, because the Missouri rule governing the issue had not yet been annunciated. The Missouri Supreme Court denied transfer, effecting a final judgment under Missouri law.

B. Missouri's Rule Violates Petitioners' Procedural Due Process Rights

The question of whether grant of intervention is a requisite for appellate standing often arises in cases throughout the United States in which unnamed plaintiffs object to the terms of a class action settlement, yielding different results in different jurisdictions and thus creating an incentive for forum shopping. Missouri Rule of Civil Procedure 52.08, identical to Federal Rule of Civil Procedure 23, governs class actions filed in Missouri courts. Nothing in the text of either rule suggests a party must be granted leave to intervene in order to obtain standing to appeal. The sole function of intervention in the class action context is preserving appellate review.[2]

The Due Process Clause protects the rights of parties to a class action settlement. *Hansberry v. Lee*, 61 S.Ct. 115, 118, 311 U.S. 32, 42 (1940). While the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular procedure for establishing the conclusiveness of judgments in class actions, due process is violated where the procedure adopted does not fairly insure that the interests of parties to be bound by the judgment are protected. *Id.* "[A]bsent a countervailing interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971).

There was certainly nothing voluntary about this settlement for Petitioners. They were not notified of negotiations as they were taking place, and had no ability to opt out of the settlement once it was announced. Unlike an intervening party in a non-class action case, an unnamed class member cannot block a class action settlement; only the assent of the class representative is essential to the settlement. *See Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 881 (7th Cir. 2000).

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[2] As one commentator stated, "Intervention is solely a formality to the preservation of appellate review." Cecilia Lacey O'Connell, *The Role of the Objector and the Current Circuit Court Confusion Regarding Federal Rule of Civil Procedure 23.1: Should Non-Named Shareholders be Permitted to Appeal Adverse Judgments?*, 48 CATH. U. L. REV. 939, 970 (1999).

The interpretation of Rule 52.08 rendered by the Missouri courts' decision in this case, denying Petitioners standing to appeal the settlement's adequacy, violated due process because it denied them the right to appeal a patently unfair settlement. Missouri statute grants parties to civil matters a right to appeal. "Any party to a suit aggrieved by any judgment of any trial court in any civil cause from which appeal is not prohibited by the constitution . . . may take his appeal to a court having appellate jurisdiction . . . any final judgment in the case . . ." R.S.Mo. § 512.020.

By denying transfer of the dismissal of Petitioners' appeal for lack of standing, the Missouri Supreme Court essentially found that Petitioners *were not a party to* the class action suit. This is despite the fact that hundreds of thousands of tax dollars found by the Missouri Supreme Court to have been illegally collected from Petitioners by MSD were bargained away by counsel for the class representative Plaintiff.

The opportunity to challenge the trial court's determination on the settlement's fairness, particularly under the facts of this case, is one of tremendous consequence. "[W]ithout court approval and a subsequent right to ask for review, such claimants would be faced with equally unpalatable alternatives – accept either nothing at all or a possibly unfair settlement." *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971) (holding that unnamed class members have standing to appeal despite denial of intervention). Not surprisingly, jurisdictions requiring unnamed class members to intervene are very permissive in granting intervention. *See Crawford*, 201 F.3d at 881. As the Seventh Circuit noted in *Crawford*, where the class settlement was ultimately nullified, "Because only parties may appeal, it is vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision." *Id.* at 881.

A statute may be constitutionally invalid as applied when it deprives an individual of a protected right, though the statute's validity as a measure enacted in the legitimate exercise of state power is beyond question. *See Little v. Streater*, 101 S.Ct. 2202, 2210-11, 452 U.S. 1, 16, 68 L.Ed.2d 627 (1981). There can be little doubt that Missouri Rule of Civil Procedure 52.08 is a valid exercise of state power. As applied in this instance, however, the Rule violates Petitioners' due process rights by vitiating their statutory right to appeal a fundamentally unfair settlement which they had no say in reaching. The split among the circuits should be resolved. The right of unnamed class members to appeal the validity of settlements to which they are bound, but in which they have no say, should be firmly established.

II. Class Representation was Inadequate as Demonstrated by the Settlement's Unfairness, Violating the Due Process Clause

The inadequacy of the class representation in this case, as reflected by the settlement reached, was argued extensively at the trial level, before the Missouri Court of Appeals and again in Petitioners' Application for Transfer. *See* Appendix E, at A-51, A-90 and A-117. *Hansberry* establishes that due process requires adequate class representation:

> Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in

> this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants.

51 S.Ct. at 120, 311 U.S. at 45. This case represents precisely the type of unfairness that this Court squelched in *Hansberry*, where an attempt to enforce a fraudulent stipulation in a prior action as res judicata was held to be in violation of class members' due process rights in subsequent litigation.

In the instant case, 420,000 class members were forced into a MO.R.CIV.P. Rule 52.08(b)(3) non-opt-out class action that unfairly decimated their recovery of illegally collected taxes. The most important factor in assessing the fairness of a class action settlement is "the strength of the case for plaintiffs on the merits balanced against the amount offered in the settlement." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975). In the instant case, the settling parties failed to present substantial evidence that the significant discount of the plaintiff class' claims were justified given the strength of plaintiff's claims.

Plaintiffs' claim in the instant case was essentially res judicata. In *Beatty II*, the Missouri Supreme Court unequivocally held that MSD's 1992-1993 wastewater disposal increase under Ordinance No. 8657 was unconstitutional because MSD did not seek voter approval as required by Article X, § 22(a) of the Missouri Constitution. 867 S.W.2d at 221. MSD conceded this point below. (LF 25)

Further, MSD profited handsomely from its Hancock violation because it retained approximately $40 million of the illegal charges in an account bearing interest at five percent since 1993. (TR 105, LF 278) At the statutory rate of nine percent, the principal and interest of MSD's funds are in excess of $75 million; at the rate of five percent, MSD's funds exceed $56 million. The settlement agreement provided a class recovery of only $25.6 million—an astounding reduction of *thirty-six percent* from the principal due, *fifty-five percent* from the five percent interest calculation and *sixty-six percent* reduction from the nine percent interest calculation.

The record is devoid of any evidence supporting such a massive reduction of the plaintiffs' Hancock Amendment claims. Under Missouri law, a utility is required to pay interest from the date of an unlawful collection. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Com'n of Missouri*, 602 S.W.2d 852 (Mo.App. W.D. 1980).

MSD and the settling class representative presented no justification for refunding such a small portion of the principal and interest obtained from the illegally collected taxes. Determining the legal strength of a defendant's defenses is a matter within the province of a court. MSD's two main arguments—that sovereign immunity bars the payment of interest and that plaintiffs are not permitted to bring a class action for a tax refund—are severely undermined by two Missouri Supreme Court decisions arising from MSD's collection of the illegal taxes. In *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716 (Mo. banc 1998) (*Ring I*), the Missouri Supreme Court reversed the appellate and trial courts in holding that sovereign immunity did not bar the plaintiffs' claim. Finally, in *Beatty III*, the Missouri Supreme Court suggested that a class action would be the appropriate mechanism for MSD's customers to recover the illegal tax.

The settlement is also inadequate because approximately $4,521,000 is to be subtracted from the settlement funds to pay Plaintiffs' attorneys' fees. While many class action settlements may legitimately deduct attorneys' fees from the pool of settlement funds, in this case Plaintiffs had an undisputed right to be awarded their attorneys' fees under the Missouri Constitution. As a disincentive for political subdivisions to violate the Article X, § 22 prohibition against increasing taxes without the consent of the affected voters, Article X, § 23 of the Missouri Constitution requires the offending government subdivision, here MSD, to pay the successful plaintiffs' attorneys' fees. This conflict of interest on the part of the class representative plaintiff's attorney demonstrates the inadequacy of representation provided.

Petitioners' reasons for asserting inadequacy of representation are synonymous with their objections: namely, the settlement is not fair, reasonable, or adequate given the unjustified discount of the class' claim. In this case, the issue of adequacy of representation is inextricably linked to the issue of whether the settlement was fair, reasonable, and adequate. *See e.g., In re Corrugated Container Antitrust Litigation,* 643 F.2d 195, 212 (5th Cir. 1981) (stating that "[i]f the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel"). The requirement that representation of absent parties be adequate, set forth in *Hansberry*, has not been met.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSOURI

SC83432
ED77467 AND ED77469

January Session, 2001

Robert A. Ring, et al.,
Respondents,
vs. (TRANSFER)
The Metropolitan St. Louis Sewer District,
Respondent,
and
Barnes-Jewish Hospital, et al.,
Appellants.

Now at this day, on consideration of the appellants Barnes-Jewish Hospital, et al.'s application to transfer and appellants Mark D. Roberts, et al.'s application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said applications be, and the same are hereby denied.

STATE OF MISSOURI-Set.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 200 1, and on the 24th day of April, 2001, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 24th day of April, 2001.

/s/: Thomas F. Simon

______________________Clerk

________________________D.C.

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Nos. ED77467 & 77469

ROBERT A. RING, 6024 WASHINGTON AVENUE, INC., CHAMP SPRING CO., KICKHAM BOILER AND ENGINEERING, INC., VIKING LODGE AND RESTAURANT, INC., APARTMENT EXCHANGE, INC., and MICHAEL F. KICKHAM, SR.
Plaintiffs/Respondents,

vs.

THE METROPOLITAN ST. LOUIS SEWER DISTRICT,
Defendant/Respondent,

and

BARNES-JEWISH HOSPITAL, DAIMLER-CHRYSLER CORPORATION, EMERSON ELECTRIC CO., SSM HEALTHCARE, UNITY HEALTH SYSTEM, MARK D. ROBERTS, STEVEN OBERG, and GRETCHEN WILLIAMS,
Appellants.

Appeal from the Circuit Court
of the City of St. Louis

Hon. David A. Dolan

FILED: December 5, 2000

Barnes-Jewish Hospital, Unity Health System, SSM Healthcare System, Emerson Electric Company, and Daimler-Chrysler Corporation ("Barnes-Jewish class members") and Mark D. Roberts, Steven Oberg, and Gretchen Williams ("Roberts class members") appeal the judgment of the trial court, denying their motions to intervene and approving the class action settlement between Metropolitan Sewer District ("MSD") and Robert A. Ring, Champ Spring Co., Kickham Boiler and Engineering, Inc., Viking Lodge and Restaurant, Inc., Apartment Exchange, Inc., and Michael F. Kickham Sr. ("Ring plaintiffs"). We sustain the motions to dismiss the appeal of the class action settlement for lack of standing and affirm the denial of the motions to intervene.

In *Beatty v. Metropolitan St. Louis Sewer Dist.,* 867 S.W.2d 217, 221 (Mo. banc 1993) (*"Beatty II"*), the Supreme Court of Missouri ruled that a rate increase by MSD violated article X, section 22(a) of the Missouri Constitution because MSD did not obtain voter approval for the increase.[1] In violation of article X, section 22(a), MSD collected $39,700,000 in overcharges pursuant to the rate increase between July 1, 1992, and June 30, 1993.[2] Subsequent to ruling the rate increase unconstitutional, the Supreme Court in *Beatty v. Metropolitan St. Louis Sewer Dist.*, 915 S.W.2d 791, 795 (Mo. banc 1995) (*"Beatty III"*), held that only those persons who actually sued in *Beatty II* could recover the increase overcharges. In *Ring v. Metropolitan St. Louis Sewer Dist.*, 969 S.W.2d 716 (Mo. banc 1998), a class action was brought on behalf of those not a part of the initial suit against MSD to recover the overcharges. The trial court dismissed the class action on statutory and sovereign immunity grounds. *Id.* This court affirmed and transferred the case to the Supreme Court, which reversed the dismissal and remanded the case back to the trial court. *Id.* at 719.

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[1] Litigation surrounding MSD's attempt to increase wastewater charges began in 1987 when this court ruled in *Beatty v. Metropolitan St. Louis Sewer Dist.,* 731 S.W.2d 318 (Mo. App. 1987 (en banc) (*"Beatty I"*) that the user fees imposed in conjunction with a bond issue without voter approval violated article X, section 22(a) of the Missouri Constitution

[2] MSD collected $39,700,000 in overcharges pursuant to the rate increase but has refunded approximately $1,400,00 of the overcharges. MSD still has $38,300,000 of collected overcharges.

After the case was remanded, MSD and the Ring plaintiffs agreed to settle the case. The settlement called for a $30,140,000 refund of which $4,521,000 would be paid for attorney's fees. The balance of $25,619,000 would be distributed among the Ring class members who could be located. Notice of the settlement was sent to the class. On November 1, 1999, the trial court held a hearing on the proposed settlement. Prior to the hearing, the Roberts class members and the Barnes-Jewish class members filed objections to the proposed settlement. The Roberts class members filed a motion to intervene as a matter of right under Rule 52.12(a) with their objections to the proposed settlement. On November 22, 1997, after the fairness hearing, the Barnes-Jewish class members also filed a motion to intervene under Rule 52.12(a). On December 27, 1999, the trial court entered a judgment approving the settlement, overruling all objections, and denying the motions to intervene. The Barnes-Jewish class members and the Roberts class members appeal the denial of the motions to intervene and the approval of the proposed settlement.

In their first point on appeal, the Barnes-Jewish class members and the Roberts class members argue that the trial court erred in approving the proposed class action settlement because it was not fair, reasonable, and adequate. Both the Ring class members, plaintiff-respondent, and MSD, defendant-respondent, have moved to dismiss the appeal contending that the Barnes-Jewish class members and the Roberts class members do not have standing to appeal the approval of the settlement because their motions to intervene were denied; therefore, they were not parties to the action.

No Missouri case has directly considered whether an unnamed class member who was denied intervention has standing to appeal the approval of a class action settlement. Missouri Rule 52.08 is identical to Rule 23 of the Federal Rules of Civil Procedure; therefore, we look to federal precedent for guidance. Ralph v. American Family Mut. Ins. Co., 809 S.W.2d 173, 174 (Mo. App. 1991). The federal circuit courts have taken various approaches when confronted with unnamed individual class members who have not intervened but seek to appeal the settlement. In the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, unnamed class members do not have standing to appeal absent intervention. *See Felzen v. Andreas,* 134 F.3d 873 (7th Cir. 1997); *Shults v. Champion Int'l Corp.,* 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles,* 11 F.3d 1004 (10th Cir. 1993); *Walker v. City of Mesquite,* 858 F.2d 1071 (5th Cir. 1988); *Guthrie v. Evans,* 815 F.2d 626 (11th Cir. 1987). In the Third and Ninth Circuits, unnamed class members have standing to appeal final orders. *See Carlough v. Amchem Products, Inc.,* 5 F.3d 707 (3d Cir. 1993); *Marshall v. Holiday Magic, Inc.,* 550 F.2d 1173 (9th Cir. 1977).

The Eighth Circuit is persuasive here. No Eighth Circuit case has directly addressed whether an unnamed class member has standing to appeal the fairness of a settlement after a motion to intervene in the underlying case was denied. However, in *Croyden Assoc. v. Alleco, Inc.,* 969 F.2d 675 (8th Cir. 1992), cert. denied, 507 U.S. 908, 113 S.Ct. 1251, 122 L.Ed.2d 650 (1993), an unnamed class member submitted written objections to the proposed class action settlement, appeared at the fairness hearing, and made oral objections at the fairness hearing, but failed to make a motion to intervene. *Croyden,* 969 F.2d at 677. Relying on *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987) and *Marino v. Ortiz*, 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988), the Eighth Circuit held that "unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so." *Id.* at 679.

In *Guthrie*, the court held that unnamed class members do not have standing to appeal a final judgment binding on the class members, indicating three reasons. *Guthrie*. 815 F.2d at 628. First, unnamed class members have not followed the procedures provided for in Rule 23 of the Federal Rules of Civil Procedure and therefore cannot represent the class. *Id.* Second, unnamed class members who disagree with the course of the class action have adequate procedures available to protect their interest. *Id.* "Third, class actions could become unmanageable and non-productive if each member could individually decide to appeal." *Id.*

In *Marino,* the Supreme Court held that because the petitioners were not parties to the underlying case and because the petitioners failed to intervene in the underlying lawsuit they could not appeal the settlement. *Marino*, 484 U.S. at 304, 108 S.Ct. at 587. The Court noted the well-settled rule that only parties to a lawsuit or those who properly become parties may appeal an adverse judgment. *Id.* The Court also noted that "the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." *Id.*

While the cited cases do not specifically address standing to appeal when an unnamed class member's motion to intervene is denied, we find the reasoning in *Marino* and *Guthrie*, adopted by the Eighth Circuit in *Croyden*, to be persuasive here. Requiring intervention as a condition for appeal insures that class actions will continue to serve their purpose in making the litigation manageable. In addition, when a motion to intervene is denied the party still may appeal the denial of the motion. *Marino*, 484 U.S. at 304, 108 S.Ct. at 588; *State ex rel. Reser v. Martin,* 576 S.W.2d 289, 291 (Mo. banc 1978). We find that neither the Barnes-Jewish class members nor the Roberts class members have standing to appeal the adequacy of the settlement agreement because their motions to intervene were denied. The motions to dismiss are sustained.[3]

The Barnes-Jewish class members and the Roberts class members, however, do have standing to appeal the denial of their motion to intervene. The applicable standard of review is set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The judgment of the trial court denying a motion to intervene will be reversed if it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *Borgard v. Integrated Nat'l Life Ins. Co.*, 954 S.W.2d *532,* 535 (Mo. App. 1997). To intervene as a matter of right, the burden is on the movant to prove all the following requirements are met: (1) the applicant must have an interest in the subject matter; (2) a disposition of the action may impede the ability of the applicant to protect that interest; and (3) the applicant's interests are not adequately represented by the existing parties. Rule 52.12(a)(2); *Borgard*, 954 S.W.2d at 535. The trial court may deny the motion to intervene if one of the requirements is not met. *Id.*

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[3] In the motions to dismiss, respondents also argue that appellants' motions to intervene were untimely and inadequate. Since the motions to dismiss are sustained based on lack of standing to appeal the class action settlement, we do not reach these points. Our review of the settlement agreement and the attorney's fees is limited to the issue of adequacy of representation as it relates to the motions to intervene.

The Barnes-Jewish class members and the Roberts class members contend that the trial court erred in denying their motions to intervene because all three of the requirements of Rule 52.12(a)(2) were met. We need only address the third requirement. The Barnes-Jewish class members and the Roberts class members claim that the named class representatives did not adequately represent their interests as evidenced by the unfair settlement. We disagree.

In the order and judgment, the trial court stated:

> The named plaintiffs and class counsel have fairly and adequately protected the interests of the class. Class counsel has pursued this litigation through the Missouri Circuit and Appellate Courts since 1992, including since 1995 with these named plaintiffs in this action. There is no conflict between the named plaintiffs and the class, as all class members are receiving identical benefits from the settlement.

When two parties are advocating the same position and one is already a party to the underlying suit, leave to intervene is not required. *State ex rel. Edel v. City of Springfield,* 935 S.W.2d 339, 343 (Mo. App. 1996). One party is adequate to represent both parties' interests. *Id.* Both the named Ring class members, and the Barnes-Jewish class members and the Roberts class members seek the same benefits, a fair monetary refund of the overcharges paid to MSD. While there is a difference of opinion as to the amount they should receive in the settlement, their interests are identical. In addition, the named class members are composed of an individual who paid the single-unit residential charges, a corporation who paid the multi-unit residential charges, and three corporations who paid the non-residential charges. The named class members represented all types of class members subjected to MSD's overcharges. The unnamed class members have no interests that were not represented in their absence.

The Barnes-Jewish class members and the Roberts class members also argue that the named class members did not adequately represent their interest because the settlement is not fair and reasonable. Our review of this argument is limited to a determination of whether substantial evidence supports that the named class members adequately represented their interest in arriving at the settlement. The adequacy of class representation can be determined by looking at the settlement. *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994). When determining if a settlement is fair, reasonable, and adequate the court must consider: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members. *State ex rel. Byrd v. Chadwick,* 956 S.W.2d 369, 378 n.6 (Mo. App. 1997); *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1150, 1152 (8th Cir. 1999).

The most important consideration in determining if a settlement is fair, reasonable, and adequate is the strength of the plaintiff's case on the merits balanced against the offered settlement. *Petrovic*, 200 F.3d at

1150. The Barnes-Jewish class members and the Roberts class members claim that they have a strong case for 100% recovery of the overcharge plus interest and attorney's fees because the Missouri Supreme Court ruled the rate increase unconstitutional. Contrary to their claim of 100% recovery, MSD pleaded several theories for defenses to the class action suit in their answer to the second amended petition including violation of the statute of limitations, laches, and that interest is barred by sovereign immunity. Testimony concerning MSD's defenses was offered at the fairness hearing. MSD also disputed the claims for post-judgment interest and attorney's fees. Additionally, the Missouri Supreme Court acknowledged in *Ring* that a remedy in this case should recognize "both the taxpayers' rights under article X, section 22(a), and the important obligations MSD bears under the environmental laws of the nation and the state." *Ring*, 969 S.W.2d at 719.

Moreover, approximately 145,000 class members have been lost and an additional 21,000 are lost each year. At the time of the hearing, evidence existed that of the class members who have presently been located, the settlement fund of $30,140,000 would provide the class members with approximately 90% of the overcharges after payment of attorney's fees. We find substantial evidence supports the trial court's determination that the settlement was fair under this factor.

The trial court also found evidence to support the remaining factors considered in determining if the settlement was fair, reasonable, and adequate. First, the Roberts class members allege collusion in reaching the settlement evidenced by the settlement calling for less than 100% recovery of the rate increases, including provisions for attorney's fees, and using a mediator in the settlement process that represents MSD in other matters. The trial court found no suggestion of fraud or collusion. Substantial evidence supports that finding. We have examined the record and find no evidence to indicate the settlement negotiations were anything other than an arms length negotiation by competent attorneys on both sides.

Additionally, the record supports a finding that the trial court properly evaluated the stage of the proceedings and the amount of discovery completed, as well as the complexity, expense, and likely duration of the case. During the previous litigation surrounding this controversy, class counsel had engaged in a substantial amount of discovery and was familiar with the issues and complexity of this case. The Roberts class members contend the trial court did not properly evaluate the complexity, length, and expense of further litigation. They claim the record fails to support the conclusions of the trial court that this litigation could continue for several more years. Litigation surrounding MSD's overcharges has already lasted over seven years, including three appeals to this court and three to the Missouri Supreme Court. Counsel for MSD continues to raise defenses to the claim for damages. The trial court was entitled to take into account the delays and risks of protracted litigation and the benefits of certainty of settlement compared to-the uncertainty of litigation.

The final factor, the opinions of class counsel, class representatives, and absent class members, also is supported by substantial evidence. Class counsel and class members testified in support of the proposed settlement. Class counsel, who has experience in Hancock Amendment litigation, testified that he did not feel the plaintiff's case was a "slam dunk," pointing out that the interest issue was risky. Class counsel also testified the sovereign immunity defense was still unsettled in the courts. Only one witness testified in opposition to the settlement. His testimony did not address the factors for determining if the settlement was fair, reasonable, and adequate. Only eleven class members in total objected to the settlement agreement and only five corporations and three individuals then appealed the approval of the settlement agreement.

We find substantial evidence supports the trial court's determination that the class representatives and class counsel adequately represented the proposed intervenors' interest in arriving at the settlement.

The appeals of the class action settlement are dismissed for lack of standing and the judgment denying the motion to intervene is affirmed.

/s/ Clifford H. Ahrens
CLIFFORD H. AHRENS,
Presiding Judge

William H. Crandall Jr., J., concurs.
Robert E. Crist, Sr. J., concurs.

APPENDIX B

***217** 867 S.W.2d 217

SUPREME COURT OF MISSOURI
EN BANC.

No. 76073

Richard BEATTY, et al.,
Appellants,

v.

The METROPOLITAN ST. LOUIS SEWER DISTRICT,
Respondent.

Dec. 21, 1993.

Landowner brought action challenging sewer district's authority to issue revenue bonds and increase its charges without vote of people. The Circuit Court, St. Louis County, Ninian M. Edwards, J., dismissed, and landowner appealed. The Supreme Court, Robertson, J., 700 S.W.2d 831, affirmed in part, reversed in part and remanded. On remand, the Circuit Court, Robert W. Saitz, J., held that district had authority to issue revenue bonds in question, and landowner again appealed. The Court of Appeals, 731 S.W.2d 318, reversed, and district entered consent decree. Subsequently, landowner and others filed new action seeking declaration that sewer district's failure to submit new charges to voters for approval violated State Constitution, and district moved to reopen former suit and to consolidate it with instant suit. After granting district's motion, the Circuit Court, Michael Godfrey, J., held that new sewer charges did not fall under state constitutional provision in question.

Plaintiffs appealed. The Court of Appeals, en banc, crease to voters for approval in advance of implementation.

Reversed and remanded.

Holstein, J., filed opinion concurring in result.

***218** Lewis C. Green, Bruce Morrison, St. Louis, for appellants.

David Wells, Mary C. Bonacors, St. Louis, for respondent.

Christine M. Treat, City Atty., Lee's Summit, for amicus curiae Lee's Sumrnit.

Robert W. McKinley, Tedrick A. Housh, III, Kansas City, for amicus curiae Gladstone.

Fred Boeckmann, Columbia, for amicus curiae Columbia & Municipal League.

David L. Wieland, Springfield, for amicus curiae Springfield.

William D. Geary, Asst. City Atty., Kansas City, for amicus curiae Kansas City.

Charles E. Callier, Jr., Asst. City Atty., St. Charles, for amicus curiae St. Charles.

ROBERTSON, Judge.

In this case we return to our continuing struggle to define the perimeters of the Hancock Amendment and particularly of Article X, Section 22(a) of the Missouri Constitution. The specific issue is whether the respondent may raise its sewer charges without approval of district voters. The trial court held that respondent could raise its charges without a vote, relying principally on this Court's recent decision in *Keller v. Marion County Ambulance District,* 820 S.W.2d 301 (Mo. banc 1991). A divided panel of the court of appeals reversed the judgment of the trial court and ordered respondent to submit its charges to the voters for approval. The court of appeals, en banc, ordered transfer of the case to this Court. We have jurisdiction, Mo. Const. art. V, § 10, and now reverse the judgment of the trial court and remand the case with directions to enter an order declaring respondent's charges subject to Article X, Section 22(a) of the Missouri Constitution.

I.

Prior to 1954, various private and governmental entities provided sewer service to the residents of the City of St. Louis and St. Louis County. On February 9 of that year, the voters of the region adopted a plan to create the Metropolitan St. Louis Sewer District ("MSD") to provide an integrated sewer system for the City of St. Louis and a majority of St. Louis County. The plan required the mayor of the City of St. Louis and the county executive of St. Louis County to appoint a six-member board of trustees to operate MSD. The plan also gave that board authority to impose ad valorem taxes and establish charges for sewer services. Under the plan, MSD took title to most of the existing sanitary and storm water sewer systems within the boundaries of the district. Today, MSD serves approximately 420,000 accounts, including single and multifamily dwellings and commercial and industrial customers, and owns and operates an extensive system of collector and interceptor sewers and treatment plants, all of which are subject to state and federal regulation. The continued ability of MSD to maintain and improve its sewer collection and treatment facilities and meet increasingly demanding state and federal regulations depends on MSD's ability to provide a revenue stream sufficient for those purposes.

For residential property, the board imposes a flat fee for sewer service. The amount of the fee remains the same no matter how much waste a residential customer sends into the system. Nonresidential customers pay a base charge plus a charge measured by the volume of waste the property adds to the system. Nearly all of the property owners within MSD receive MSD sewer charges. Failure to pay a sewer charge results in a lien against real property by operation of law. MSD is quick to point out, however, that approximately 9,000 parcels of property do not use the system and pay no service charge. These parcels escape the charge because they have an alternate means of sewage disposal or are unimproved.

Appellant Richard Beatty is a resident of St. Louis County, Missouri, owns real property there, and pays sewer charges imposed by MSD. In 1985, facing additional regulatory pressures and maintenance costs, MSD issued revenue bonds and increased its sewer charges to meet debt service on the bonds ***219** and to operate and maintain the sewer system. MSD imposed these increased charges without voter approval. Mr. Beatty filed an action challenging MSD's authority to issue revenue bonds and increase its charges without a vote of the people. Mr. Beatty contended that Article X, Section 22(a) of the Missouri Constitution prohibited such an increase without voter approval. The court of appeals reversed the trial court's judgment that held that MSD had authority to issue the revenue bonds in question. *Beatty v. Metropolitan St. Louis Sewer District,* 731 S.W.2d 318 (Mo. App. 1987) (en banc). Because MSD did not have authority to issue the revenue bonds, the user fees imposed in conjunction with the bond issue without voter approval violated Article X, Section 22(a). Following the court of appeals' decision, MSD entered into a consent decree and agreed that Article X, Section 22(a), applied to the sewer charges at issue in the case. MSD submitted the question of increasing its user charges to the voters in 1988. The voters approved the increases in wastewater charges (to $4.18 per month), capital improvement charges ($6.50 per month), and storm sewer charges ($0.24 per month).

In February, 1990, MSD sought the voters' permission to increase its sewer charges again. The voters rejected the increase.

On December 17, 1991, this Court issued its decision in *Keller.* A deeply divided Court held that a local ambulance district's increased charges for ambulance service were not fees within the meaning of Article X, Section 22(a). MSD read *Keller* in light of its financial needs and increased its wastewater charges by $4.00 per month without voter approval. Claiming a purpose to avoid rate shock, MSD 's new charges did not change the gross monthly single-family residential bill; it remained at $10.29 per month. Instead, MSD offset the wastewater charge increase of $4.00 with a reduction in the capital improvement surcharge by a corresponding $4.00.

On June 17, 1992, Mr. Beatty and others filed a new action *(Beatty II)* in St. Louis County claiming that the decision in *Beatty I* was *res judicata,* required MSD to submit any increase in sewer charges to the voters for approval and, in any event, seeking a declaration that MSD 's failure to submit its new charges to the voters for approval violated Article X, Section 22(a). MSD filed a motion to reopen *Beatty I,* seeking relief from the judgment in *Beatty I,* on June 26, 1992. That same day, MSD filed its motion to consolidate *Beatty I* and *Beatty II*. Ultimately, the trial court sustained these motions and consolidated the two cases. In none of its legal papers did MSD seek to recover sewer charges it lost as a result of the decision in *Beatty I* or to apply a favorable decision in *Beatty II* retroactively.

The trial court heard evidence, applied *Keller,* and held that the new sewer charges did not fall under Article X, Section 22(a). This appeal followed.

II.

Article X, Section 22(a), prohibits a political subdivision of this state "from increasing the current levy of an existing tax, license or fees [sic], above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that . . . political subdivision voting thereon." MSD is a political subdivision of the state. Thus, the question before the Court is whether the sewer charge imposed by MSD is a "tax, license or fees" [sic] within the meaning of Article X, Section 22(a). If so, such charges cannot be increased without prior voter approval. In considering this question, we assume that MSD's silence on the issue is tantamount to an admission that the four dollar increase in the wastewater service charge constitutes an increase in the charges MSD requires its residential customers to pay. This decision, while predicated on MSD's tacit admission, does not decide the question whether the constitution requires voters to approve a political subdivision's decision to increase part of its fees and decrease another part where the amount due from the fee payer remains the same.

A.

[1] Mr. Beatty begins his brief with what he believes is a procedural *coup de grace*. He claims that Rule 74.06(b)(5) does not permit ***220** the trial court to relieve MSD of the final judgment in *Beatty I*, that the consent decree in *Beatty I* is *res judicata*, and that MSD 's consent decree in *Beatty 1* estops MSD from claiming now that it may raise its sewer charges without voter approval.

While Mr. Beatty presents an interesting academic question, it is unavailing in this context. First, *Keller* raises a legitimate legal question as to whether MSD's charges fall under Article X, Section 22(a). Second, in apparent recognition of this fact and in response to MSD 's interpretation of *Keller*, Mr. Beatty himself filed an independent action challenging MSD's increased sewer charges *prior to* MSD seeking to reopen the *Beatty I* decision. MSD's motion raises the identical, ultimate legal question joined by Mr. Beatty in his second suit. The trial court's decision to consolidate *Beatty I* and *Beatty II* and decide only the genuine legal issue raised in *Beatty II* eliminates Mr. Beatty's procedural claim. The point is denied.

B.

Keller overruled *Roberts v. McNary*, 636 S.W.2d 332 (Mo. banc 1982). In doing so, *Keller* rejected "the contention that all fees — whether user fees or tax-fees — are subject to the Hancock Amendment." 820 S.W.2d at 304. To assist in determining whether a governmental charge is a tax within the meaning of Article X, Section 22(a), or user fee not subject to constitutional controls, *Keller* suggested a five-pronged analysis. *Keller*, 820 S.W.2d at 304-5, n. 10.

[2] Mr. Beatty urges that we overrule *Keller* as wrongly decided. While the Court will continue to assess the wisdom and viability of *Keller's* holding in appropriate cases, we need not decide *Keller's* ultimate fate in this case. Application of the *Keller* test requires that MSD submit its sewer charge increase to the voters for approval in advance of implementation.

1. When Is the Fee Paid?

Keller informs that fees subject to Article X, Section 22(a), are "likely due to be paid on a periodic basis while fees not subject to [Article X, Section 22(a)] are likely due to be paid only on or after provision of a good or service to the individual paying the fee." *Id.* at 304. Mr. Beatty argues that the sewer charge is paid on a periodic basis and thus falls within *Keller's* first test for inclusion within Article X, Section 22(a). MSD counters that sewer charges are payments for services rendered by MSD to the sewer customer and are thus goods or services under *Keller's* initial test.

MSD misunderstands the first *Keller* test. The question posed there is not whether the political subdivision provides a service but the regularity with which the fee is paid. In this case, the fee is imposed and paid on a periodic — quarterly — basis. Because the first *Keller* test concerns itself only with timing, we resolve the first issue in favor of Mr. Beatty's position.

2. Who Pays the Fee?

Keller says that a fee subject to Article X, Section 22(a) is "likely to be blanket-billed to all or almost all of the residents of the political subdivision while a fee not subject to [Article X, Section 22(a)] is likely to be charged only to those who actually use the good or service for which the fee is charged." *Id.* at 304. The record in this case reveals that only 9,000 of the approximately 420,000 parcels of real estate in the district are not subject to MSD charges. Mr. Beatty argues that this is "almost all;" MSD argues that only those persons receiving its sewer service pay the fee. While it is true that almost all residents of the district pay the charge, it is also true that only those persons who actually use MSD's services pay the charge. On application of the second prong of the *Keller* test, MSD has the better side of the argument.

3. Is the Amount of the Fee to Be Paid Affected by the Level of Goods or Services Provided to the Fee Payer?

The third *Keller* test suggests that fees subject to Article X, Section 22(a) are "less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to [Article X, Section 22(a)] are likely to be dependent on the level of goods or services provided to the fee payer." ***221** *Id.* at 304. Mr. Beatty argues that the charge imposed by MSD bears no relation to the amount of the services MSD provides its customers; MSD argues that its charges, though admittedly uniform, reflect the estimated, average use a residential customer makes of MSD's services and, as to nonresidential customers, bears a direct relationship to the amount of service received.

Keller's third test focuses on the individual paying the fee. In order for a governmental charge to appear to be a user fee under *Keller's* third criteria, the charge imposed must bear a *direct* relationship to the level of services a "fee payer" actually receives from the political subdivision. If MSD's argument as to residential customers were correct, every tax, license, or fee would appear more like a user fee than an Article X, Section 22(a) tax. An economist could easily construct a model to show that any fee government collects is based on the "estimated, annual" use of governmental services by a taxpayer. Because the vast majority of MSD fee payers are residential, we conclude that Mr. Beatty has the better argument here.

4. Is the Government Providing a Service or Good?

The fourth *Keller* factor asks whether the charge paid by the "fee payer" is directly related to a service provided by a political subdivision. This factor distinguishes non-Article X, Section 22(a) fees from taxes generally, the latter being paid without relation to any specific service provided by government. On this fourth factor, MSD prevails; it clearly provides a service in return for a direct payment.

5. Has the Activity Been Historicall and Exclusively Provided by the Government?

Each of the parties in this case points to a plethora of historical examples of the private or public provision of sewer services to assist their position. Application of the fifth factor is inconclusive, given the mix of public and private entities that have supplied sewer service historically.

In sum, application of the *Keller* test to the facts of this case provides no clear answer as to the nature of MSD's charges.

C.

Reduced to its essence, the Hancock Amendment reveals the voters' basic distrust of the ability of representative government to keep its taxing and spending requirements in check. As an additional bulwark against local government abuse of its power to tax, the voters amended the constitution to guarantee themselves the right to approve increases in taxes proposed by political subdivisions of the state. Whether a governmental charge is a tax is the issue with which *Keller* struggled. And as *Keller* shows, the language employed in Article X, Section 22(a), is ambiguous.

[3] In the face of ambiguous language in the organic document of the state, this Court is required to attempt to ascertain the intent of the voters from the language they adopted and to resolve doubts as to meaning in favor of that intent. Where, as here, genuine doubt exists as to the nature of the charge imposed by local government, we resolve our uncertainty in favor of the voter's right to exercise the guarantees they provided for themselves in the constitution.

As we have previously said, the facts of this case do not clearly define the nature of MSD's charges. Only fee payers who use its services pay for MSD's services. The charge imposed, however, is not directly related to the amount of services an individual, residential fee payer uses. In the end, our uncertainty as to the nature of the charge MSD imposes is heightened by the fact that unpaid sewer charges trigger a lien against real property by operation of law. Thus, we resolve our doubts in favor of the taxpayers and hold that MSD's charges are subject to Article X, Section 22(a), and may not be increased without prior voter approval.

III.

The judgment of the trial court is reversed and the cause remanded.

***222** COVINGTON, C.J., and BENTON, THOMAS, PRICE, and LIMBAUGH, JJ., concur.

HOLSTEIN, J., concurs in result in separate opinion filed.

HOLSTEIN, Judge, concurring in result.

I concur in result with the majority opinion. I add these comments only by way of pointing out that I do not join in the majority's application of the five-part test taken from the footnote of *Keller v. Marion Co. Ambulance Dist.,* 820 S.W.2d 301 (Mo. banc 1991).

I concede that I lacked enthusiasm when this Court adopted the proposition that a "fee," as used in article X, § 22(a) of the Constitution, only means those fees which are, in reality, a tax. But that is now the law. The very concept of the rule of law requires continuity and respect for precedent which is, by definition, indispensable. *Planned Parenthood v. Casey,* 505 U.S. 833, ___, 112 S.Ct. 2791, 2808, 120 L.Ed.2d 674 (1992). I do not here suggest abandonment of the fundamental holding in *Keller.* At the same time, I believe that the five criteria noted in footnote 10 of the *Keller* opinion are so vague and subject to manipulation that they will necessarily result in repetitive litigation and are unworkable. Careful consideration of the facts of this case according to the five criteria demonstrate how the factors may be manipulated by both government and taxpayer litigants to support their conclusions.

1. When is the fee paid?

The first criterion posits two questions regarding when the fee is paid: 1) are the fees paid on a periodic basis, and 2) are the fees paid only on or after the provision of a good or service to the individual paying the fee? If the answer to the first question is "yes" and the second is "no," then the fee is less likely to require voter approval. With regard to the first question, I agree with the majority that the answer is yes. As with all routinely recurring services, fees come due periodically. But the answer to the second question is also yes. The fees are calculated on the *previous year's cost* of operating the sewer system. Thus, under the first criterion, it is unclear whether the charge of MSD is subject to Hancock. In any event, this element may be manipulated so that charges may only occur after the rendering of services.

2. Who pays the fee?

The second criterion also is a two-pronged question. The first is, is this blanket billed to all or most all of the residents of the political subdivision? If the answer is "yes," then the fee is more like a tax. I suggest the answer is "yes" because assessing a fee against *all* tracts which have sewer service and in excess of 97% of all parcels, including those not having sewer service, is a blanket billing of "all or almost all" residents in the district. The second question posed under the second criterion is whether the charge is made only to those "who actually use the good or service for which the fee is charged." This question, if answered affirmatively, means the charge is more like a fee. Here again, the answer is a resounding yes. Virtually every property owner uses sewers. In other words, this criterion also is indecisive in determining whether this is a tax or a fee. Again, by simply narrowing the class of persons subject to the fee, this element can be manipulated.

3. Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?

Under the third *Keller* test, charges dependent upon the level of goods or services provided are not as likely to be subject to article X, § 22(a). The majority suggests that if MSD based its charges on some method of measuring the quantity of sewage, such as the amount of water usage, rather than based on the type of usage, whether residential or nonresidential, MSD's charges are more likely to qualify as fees not subject to Hancock. In other words, through the mere expedient of manipulating the method by which the fees are assessed, a charge which is unconstitutional will become constitutional. Here again, I find that neither MSD nor the taxpayer has the better of the argument on this point.

*223. 4. Is the government providing a service or good?

I agree wholeheartedly with the majority on this point. MSD is providing a service. However, I do not believe that proof that a service is being provided is a valid basis for distinguishing between taxes and fees. Assessing a "public safety" fee to each citizen who calls for police or fire protection or a "cross walk" fee to parents who have children of school age does not make those charges any less like a tax. The fourth factor is, I believe, bogus. A governmental agency may always identify some service that it performs for its fee and thereby justify any charge it makes to its citizens.

5. Has the activity been historically and exclusively provided by the government?

Here again, the fifth factor is inconclusive given the mix of public and private entities that supply sewer services. In *Keller* I noted that in much of rural Missouri, ambulance services are exclusively provided by the government. In urban Missouri, sewer services are often provided by local government, and that has been true for many years. This factor will almost always be inconclusive, as it is here, where the charge is deemed a tax, and was in *Keller,* where the charge was deemed not a tax.

This brief analysis demonstrates that the five factors of footnote 10 from *Keller* are unworkable. Four of the five factors are highly subject to manipulation so that fees charged for a service in one community must have voter approval, but a fee for the same service in another community need not have voter approval. The fifth factor is almost always inconclusive. We should find objective standards by which to distinguish fees from taxes. Only if we are wholly unable to articulate workable standards should overruling *Keller* be considered. I again predict that we have not seen the last of this type of litigation.

We have now taken the five factors from a footnote and elevated them to the basis for analysis of this case. By promoting the factors to *ratio decidendi,* we have given force to what was heretofore not fully part of the reasoning in *Keller.* I cannot join in an opinion which enlarges the status of the five factors from the footnote. Nevertheless, the Court reaches a correct result under the law. The majority opinion makes substantial headway by stating that any uncertainty is to be resolved in favor of the voter's rights guaranteed by the Constitution. The burden is placed squarely on a governmental subdivision to show its charges are permissible without a vote. On that principle alone, this case should be reversed. I concur in that result.

APPENDIX C

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: Attorneys of Record

FROM: Laura Thielmeier Roy, Clerk

DATE: February 22, 2001

RE: Motions For Rehearing And/Or Transfer To Supreme Court Denied

1. ED76923 STATE OF MISSOURI, RES V KELVIN R. WILSON, APP
2. ED77037 JG ST LOUIS, ET AL, APP V CTY OF DES PERES, ET AL, RES
3. ED77400 HARRY LACKEY, APP V STATE OF MISSOURI
4. ED77467 ROBERT A. RING, ET AL, APP V METRO STL SEWER, RES
5. ED77481 STATE OF MISSOURI, RES V ALLEN NORWOOD JR., APP
6. ED77494 WILLIAM HARVEY, RES V TIMBER RESOURCES, APP
7. ED77601 LORI NAUGLE, RES V. LEONARD NAUGLE, APP
8. ED77635 IN THE INTEREST OF: C.M.
9. ED77657 DEPT. OF LABOR, RES V CHESTER BROSS CONST., APP

10. ED77716 STATE OF MISSOURI, RES V RONNIE GRAY, APP
11. ED77751 CITY OF WARRENTON, RES V HELEN TAPLEY, APP
12. ED77792 BEVERLY STOKES, APP V RENAL TREATMENT, ET AL, RES
13. ED77912 ALEXANDER TRAINA, APP V STATE OF MISSOURI, RES
14. ED77924 WM BRUEGGEMANN, ET AL, APP V CO. OF FRANKLIN, RES
15. ED77952 KENNETH DAILEY, APP V STATE OF MISSOURI, RES
16. ED78124 JOHN METHFESSEL, APP V STATE OF MISSOURI, RES

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: Attorneys of Record

FROM: Laura Thielmeier Roy, Clerk

DATE: February 22, 2001

RE: Motions For Rehearing Denied

1. ED77515 LARRY SUTTON, APP V VEE JAY CEMENT CONTRACT., RES
2. ED77825 STATE OF MISSOURI, RES V BLAKE ANDERSON, APP

APPENDIX D

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Case Number 954-02764A
Division 3

ROBERT A. RING et al.,
Plaintiffs,

vs.

THE METROPOLITAN ST. LOUIS SEWER DISTRICT,
Defendant.

ORDER AND FINAL JUDGMENT

On November 1, 1999, in Division 3 of the Circuit Court of the City of St. Louis, appeared the Plaintiffs along with counsel and the Defendant by counsel. The Court entertained numerous motions including Motions for Continuance, Motions to Bifurcate, and Motions to Intervene on behalf of individuals and corporations. After overruling the Motions for Continuance, to Bifurcate and to Intervene, the Court heard testimony from numerous witnesses in regard to the fairness, reasonableness and adequacy of a proposed settlement in this matter. Numerous witnesses appeared and testified in support of the proposed settlement. Only one witness testified in opposition to the proposed settlement. Counsel for objecting individuals and corporations and those not allowed to intervene examined the witnesses and were also allowed to argue their clients position on the proposed settlement to the Court in closing arguments. Representative Jim Murphy was the only witness appearing in opposition to the proposed settlement and expressed his concern regarding the constitutionality and fairness of the proposed settlement.

Following the Supreme Court's decision in this case in May, 1998, the possibility of continued litigation and the probability of additional appeals were reinforced by the Court's comment that the trial court may fashion a remedy that will acknowledge both the tax payers' rights under Article X, Section 22(a) and the important obligations MSD bears under the environmental laws of the nation and state.

After hearing oral arguments on Plaintiff's Motion for Class Certification, the parties entered into a course of mediation. Following two days of mediation, led by William M. Van Cleve and Henry Menghini, the parties reached a mediated agreement that would end the extensive litigation.

On August 27, 1999, this Court approved the Conditional Stipulation of Class Settlement and ordered the parties to provide notice and claim forms to the proposed settlement class. The Court now finds that the parties have fully complied with the notice and claim form requirements.

Since the November 1, 1999, hearing on the proposed settlement, the Court has received some twelve additional filings including the considerable efforts of Mr. Johnson and Mr. Martin with motions, memoranda and correspondence. Some correspondence included summary of statements made before the Court on November 1, 1999. The Court in this Order and Judgment after considering the same, overrules those motions.

The Court will not address all the issues raised at the settlement hearing, but a few will be addressed because of the efforts made by some to appear and testify at the hearing. Representative Murphy objected to the settlement mediation process because it did not take into account what MSD's 420,000 customers would prefer. He further suggested an opinion survey to gage [sic] customer preference may be appropriate, and to proceed otherwise would be to compromise the integrity to the Court and violate the democratic principles we value. Representative Murphy is very correct in that the integrity of the Court should not be compromised or influenced; either by opinion poll or survey. The democratic principles protected by the Court include the opportunity of the public to appear at an open and public hearing. This open and public hearing process is the safeguard of the democratic process that assures the public a fair and independent judiciary.

Perhaps it is the complexity of this case that leads to the confusion and many objections in the case. Further, one must keep in mind that this is a settlement of contested issues, not a judgment following trial. The fundamental question for the Court to answer is whether the proposed settlement is fair under *all* the circumstances.

The Court heard testimony that 35% of the class members have already been lost. These lost class members will receive no refund. Additional delays and further litigation would further dilute the class.

By Order dated August 27, 1999, (the "Implementing Order"), this Court certified Plaintiffs as representatives of a Settlement Class comprised of all customers of the Metropolitan St. Louis Sewer District ("MSD") (as listed in MSD's records, including individuals, corporations, partnerships or other entities) who were charged for wastewater sewer service pursuant to the user charge schedule of MSD Ordinance 8657, effective from July 1, 1992, through June 30, 1993, (the "Settlement Class"). Notice of said class certification was provided in the manner previously ordered by the Court. By the same Implementing Order this Court preliminarily approved a Conditional Stipulation of Class Settlement ("Settlement Stipulation") in settlement of all claims in the Action (the "Settlement") between Plaintiffs, acting on behalf of themselves and the Settlement Class, and the Defendant.

Also pursuant to the Implementing Order, this Court scheduled a hearing for November 1, 1999, at 1:30 p.m. to determine, among other things, whether the proposed Settlement set forth in the Settlement Stipulation should be approved by the Court as being fair, reasonable, and adequate and whether final judgment should be entered thereon, and to consider the application of Plaintiffs' Counsel for award of Attorneys' Fees and Costs. This Court ordered that the Notice of Class Action Determination, Settlement of Class Action, and Settlement Hearing, substantially in the form attached to the Settlement Stipulation as Exhibit B (the "Class Settlement Notice"), and the Claim Form, substantially in the form attached to the Settlement Stipulation as Exhibit C, be given and provided to members of the Settlement Class by mail and publication.

As attested by the joint affidavit of counsel filed with this Court on October 15, 1999, the provisions of said Order as to the Notice and Claim Form were complied with. This Court has duly considered all of the submissions and arguments presented with respect to the proposed Settlement.

NOW THEREFORE, after due deliberation, this Court hereby FINDS, CONCLUDES, ADJUDGES and DECREES that:

1. This Order is binding on all members of the Settlement Class as described in the Court's Order of August 27, 1999. The Court finds that the requirements of subsections (a) and (b)(1)(A), (b)(1)(B), and (b)(2) of Rule 52.08 of the Missouri Rules of Civil Procedure are satisfied and that a Class shall be certified consisting of all MSD customers (as listed in MSD's records, including individuals, corporations, partnerships or other entities) who were charged for wastewater sewer services pursuant to the user charge schedule of MSD Ordinance 8657, effective from July 1, 1992 through June 30, 1993. Specifically, the Court finds:

(a) The numerosity requirement is satisfied. The class numbers approximately 420,000, and joinder of all members is impracticable.

(b) There are questions of law and fact common to all members of the class, including the question of MSD's liability to refund some or all of the 1992-93 charges, the question of the amount, if any, to be subtracted from the gross refund amount, in recognition of MSD's obligations under the environmental laws of the nation and state, as well as the questions raised by the numerous defenses asserted by MSD.

(c) The claims of the named plaintiffs are typical of the claims of the class in that all seek the refund of the same charges collected under Ordinance 8657. The named plaintiffs include representatives of all types of MSD customers, single and multi family residential and commercial customers.

(d) The named plaintiffs and class counsel have fairly and adequately protected the interests of the class. Class counsel has pursued this litigation through the Missouri Circuit and Appellate Courts since 1992, including since 1995 with these named plaintiffs in this action. There is no conflict between the named plaintiffs and the class, as all class members are receiving identical benefits from the settlement.

(e) The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for MSD, in that varying judgments could preclude MSD from treating its customers alike.

(f) The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, as illustrated by the possibility of the effect of an adverse judgment in one case as precedent to the remaining members of the class.

(g) MSD's positions and actions are the same for each of its customers (*i.e.*, the class members), and therefore MSD has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

2. The proposed Settlement of the Action on the terms and conditions set forth in the Settlement Stipulation is fair, reasonable, and adequate, is in the best

interest of the Settlement Class, and should be approved. Specifically, the Court finds:

(a) There has been no suggestion of the existence of fraud or collusion behind the settlement, and indeed the Court finds none.

(b) This litigation began in 1992 and could possibly continue for several more years. The issues are complex and unprecedented. There already have been several trips to the appellate courts. This settlement will end this litigation once and for all.

(c) Plaintiffs' counsel is most familiar with the issues involved in these proceedings and has engaged in a substantial amount of discovery.

(d) The Court has considered both plaintiffs' and defendants' positions and analyzed the probability of plaintiffs' success on the merits, and has determined that the settlement is a fair and reasonable compromise of these disputed issues.

(e) The settlement provides for a substantial percentage refund to each class member, and there is no reason to believe that the class would be reasonably likely to achieve a more favorable result by continuing with the litigation.

(f) The named plaintiffs and counsel for the class and for MSD all support the settlement. A group of some of MSD's largest customers has expressed its support of the settlement. Objections were received from only ten or so class members, out of some 420,000. The Court finds this to be persuasive evidence of the fairness of the settlement.

(g) The Court has carefully considered all of the objections filed, and finds that under all the circumstances, the settlement is fair, reasonable, and adequate.

3. The notification provided for and given to the Settlement Class and the Claim Procedure are in full compliance with the requirements of due process and Rule 52.08 of the Missouri Rules of Civil Procedure. Specifically, the Court finds:

(a) The majority of class members remain at the same location they occupied in 1992-93, and they were provided the best possible notice — direct mail to that address. For the remaining class members, who had moved, it was clear to the parties, as it is to the Court, that many would have moved within the St. Louis area and are still MSD customers. Accordingly, the notice was mailed to every current customer, and in this way has generated claims from more than 20,000 class members as of the date of the fairness hearing. Approximately 477,000 notices were mailed. Further, to reach class members who might not be in MSD's records, notice was published in the major newspaper of general circulation, the *St. Louis Post-Dispatch,* on a Sunday, Monday and Tuesday in September, 1999. Finally, MSD posted the notice and claim form on its internet we [sic] site. This massive effort to notify class members is more than sufficient to satisfy the requirements of the rule and due process.

(b) The notice described in detail the substantive claims of the plaintiffs and defendants, and recounted the seven year history of this case and the predecessor *Beatty* case. The notice invited class members to examine all of the settlement documents and court papers. The information was sufficient to enable class members to determine their interest in the litigation, and the cover letter informed the class members of their potential share of the Net Settlement Fund. In addition, class members could contact the MSD class action call center and receive information about the potential amount of their refund and to ask other questions. The notice fully explained that the settlement provided for class members to recover their share of the Net Settlement Fund in proportion to the amount of their overcharge. The notice was entirely adequate to apprise the class of the terms of the settlement, and to enable an interested class member to decide whether to support or oppose the settlement.

4. There is no just reason for delay in the entry of judgment as agreed upon in the Settlement Stipulation, pursuant to Rule 74.01(b).

5. Entry of final judgment and final approval of the proposed Settlement will settle all claims alleged or which could have been alleged in the Action between Plaintiffs and the Settlement Class on the one hand and the Defendant on the other.

6. This Order and Final Judgment is final for purposes of appeal and may be appealed notwithstanding other matters presently pending; provided however, that the parties and their counsel have agreed in the Settlement Stipulation to waive any right of appeal as to the Court's determination of Attorneys' Fees and Costs; and the Clerk is hereby directed to enter judgment thereon.

7. Certification under Rule 74.01(b) will not result in unnecessary appellate review nor will review of the adjudicated claims moot any further developments in this Action. Even if subsequent appeals are filed, the nature of these claims are such that the appellate court

would not have to decide the same issues more than once. The reservation of jurisdiction by the Court in this matter does not affect in any way the finality of this Order and Final Judgment.

It is further ORDERED, ADJUDGED and DECREED as follows:

8. The Settlement Stipulation and the proposed Settlement are hereby approved and shall be consummated in accordance with the terms and provisions thereof, and which terms and provisions are incorporated herein.

9. With respect to the Defendant, the Class Action Petition, as amended, and all Class Claims alleged in this Action are hereby dismissed in their entirety on the merits, with prejudice, and without costs to any party; provided however, that nothing contained in this paragraph shall be deemed to waive or release Defendant from any obligations under the Settlement Stipulation.

10. All members of the Settlement Class (including their heirs, executors, administrators, agents, representatives, predecessors, successors, affiliates, and assigns, and anyone claiming by and/or through them), and each of them, for good and sufficient consideration, release, remise, and forever discharge MSD and its past and present trustees, staff, officers, employees, agents, attorneys, accountants, predecessors or successors, and any person it represents, and each of them, of and from any and all manner of actions and causes of actions, suits, obligations, claims, debts, demands, agreements, promises, liabilities, controversies, costs, expenses, and attorneys' fees whatsoever, whether in law or in equity, and whether based on any federal law, state law, common law right of action, or otherwise, foreseen or unforeseen,

matured or unmatured, known or unknown, accrued or not accrued, which the members of the Settlement Class in the Action, or any of them, ever had, now have, either individually or as a member of a Class, or derivatively, by reason of; based upon, arising from, or in any way related to the 1992 MSD wastewater user charge Ordinance 8657, or the alleged acts, failures to act, omissions, misrepresentations, facts, events, transactions, statements occurrences, or other subject matter that either were or which could have been set forth, alleged, embraces, or complained of in the Action or in any action which either could have been consolidated with the Action or could have been brought in any other forum, and they shall be barred and enjoined from bringing any such claim.

11. The application by Plaintiffs' Counsel for an award of Attorneys Fees and Costs is hereby granted. Plaintiffs' Counsel, the firms of Green, Hennings & Henry LLP and the Graham Law Firm, are hereby jointly awarded total Attorneys' Fees and Costs of 15% of the Settlement Fund. As provided in the Settlement Stipulation, the court expressly finds that this award of Attorneys' Fees and Costs is for all services performed, results obtained, and costs incurred by plaintiffs and Plaintiff's Counsel in connection with this Action and the case styled *Richard Beatty et al. v. The Metropolitan St. Louis Sewer District* pending in the Circuit Court for St. Louis county, Cause No. 639099. Payment will be made by MSD from the Settlement Fund to, or as directed by Green, Hennings & Henry LLP, for distribution to all of Plaintiffs' Counsel after any and all appeals of this Final Judgment and Order or review proceedings thereof have been finally determined, or if no appeals are filed, after time to appeal has expired. Plaintiffs' Counsel Lewis C. Green shall determine the allocation of the award of fees and costs

among all Plaintiffs' Counsel based on their respective contributions to the prosecution of this litigation.

12. Costs incurred to effectuate notice and to distribute the Net Settlement Fund shall be paid by Defendant as set forth in the Settlement Stipulation and shall not be paid from the Settlement Fund.

13. This Judgment, the Settlement Stipulation and all papers related to it are not, and shall not be construed to be, an admission by Defendant of any liability or wrongdoing whatsoever, and shall not be offered as evidence of any such liability or wrongdoing in this or any future proceeding.

14. Jurisdiction is hereby reserved over all matters relating to the consummation of the Settlement in accordance with the Settlement Stipulation.

APPROVED AND SO ORDERED:

Dated this 21 day of December, 1999.

/s/ David A. Dolan
DAVID A. DOLAN
PRESIDING CIRCUIT
JUDGE
33RD JUDICIAL CIRCUIT

APPENDIX E

CONSTITUTIONAL PROVISIONS INVOLVED

Article X, Section 22(a) of the Missouri Constitution provides:

> Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. If the definition of the base of an existing tax, license or fees, is broadened, the maximum authorized current levy of taxation on the new base in each county or other political subdivision shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

Article X, Section 23 of the Missouri Constitution provides:

> Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county or other political subdivision shall have standing to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive, of this article and, if the suit is sustained, shall receive from the applicable unit of government his costs, including reasonable attorneys' fees incurred in maintaining such suit.

STATUTORY PROVISIONS INVOLVED

Section 512.020, Revised Statutes of Missouri, provides:

> Any party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited by the constitution, nor clearly limited in special statutory proceedings, may take his appeal to a court having appellate jurisdiction from any order granting a new trial, or order refusing to revoke, modify, or change an interlocutory order appointing a receiver or receivers, or dissolving an injunction, or from any interlocutory judgments in actions of partition which determine the rights of the parties, or from any final judgment in the case or from any special order after final judgment in the cause; but a failure to appeal from any action or decision of the court before final judgment shall not prejudice the right of the party so failing to have the action of the trial court reviewed on an appeal taken from the final judgment in the case.

Missouri Rule of Civil Procedure 52.12(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action (1) when a statute of this state confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Missouri Rule of Civil Procedure 52.08(a), identical to Federal Rule of Civil Procedure 23(a), provides:

> **(a) Prerequisites to a Class Action**. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Missouri Rule of Civil Procedure *52.08(e),* identical to Federal Rule of Civil Procedure 23(e), provides:

> **(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

IN THE SUPREME COURT OF MISSOURI

Circuit Court no. 954-02764
Court of Appeals No. ED 77467 & 77469
Supreme Court No. 083432

ROBERT A. RING, et al.,
Plaintiffs/Appellants

vs.

THE METROPOLITAN ST. LOUIS SEWER DISTRICT,
Defendants/Respondent

BARNES-JEWISH HOSPITAL, et al.,
Appellants

MARK D. ROBERTS, et al.,
Appellants

Court of Appeals, Eastern District
Circuit Court for City of St. Louis

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion ___ or
after opinion X

The date the record on appeal was filed:	February 25, 2000
The date the Court of Appeals opinion was flied:	December 5, 2000
The date the motion for rehearing was filed:	December 20, 2000
and ruled on:	February 22, 2001
The date the application for transfer was filed in the Court of Appeals:	December 20, 2000
and ruled on:	February 22, 2001

Party		**Attorney**
Barnes-Jewish Hospital, Daimler-Chrysler Corporation, Emerson Electric Company, SSM Healthcare, and Unity Health System Intervenors-Appellants	X	Jeffrey J. Kalinowski #29926 Eric D. Martin #47558 BLACKWELL, SANDERS PEPER MARTIN, LLP 720 Olive St., Suite 2400 St. Louis, Missouri 63101 (314) 345-6000 Fax: (314) 345-6060
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Robert A. Ring, 6024 Washington Avenue, Inc., Champ Supreme Co., Kirkham Boiler & Engineering, Inc., Viking Lodge & Restaurant, Inc., Apartment Exchange, Inc., and Michael F. Kirkham, Sr. Plaintiffs-Respondents		Louis C. Green #14547 Bruce A. Morrison #38359 GREEN HENNINGS & HENRY, LLP 705 Olive St., Suite 614 St. Louis, Missouri 63101 (314) 231-4181 Fax:

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Adam's Mark Hotel, Alcoa Foil Products, Anheuser-Busch Companies, Inc., The Boeing Company, Ford Motor Company, Hussman Refrigeration, Mallinckrodt Inc., Procter & Gamble Manufacturing, & Ralston Purina Company, ("Missouri Industrial Energy Consumers"), Amicus Curie	Diana M. Vuylsteke BRYAN CAVE LLP One Metropolitan Square 211 North Broadway, Suite 3600 St. Louis, MO 63102-2543

APPLICATION TO TRANSFER

COME NOW Barnes-Jewish Hospital, Daimler-Chrysler Corporation, Emerson Electric Company, SSM Healthcare, and Unity Health System ("Barnes-Jewish Class Members") and move this Court, pursuant to Rule 83.04, to transfer this case from the Missouri Court of Appeals, Eastern District. In compliance with Rule 83.05, the Barnes-Jewish Class Members state that the following questions of general interest and importance support the transfer of this case:

1. A question of general interest and importance exists as to the sufficiency of evidence that settling parties must adduce in order to establish "substantial evidence" of a settlement's fairness, reasonableness, and adequacy. In a case of first impression under Missouri law, this Court held that substantial evidence supported the trial court's decision to approve a settlement that refunds to taxpayers less than half of the principal ($39.7 million) and interest ($30 million) that MSD obtained from collecting an unconstitutional tax despite the following:

   a. MSD is required by Missouri Supreme Court precedent to refund the entire amount of the illegal tax it collected. *Beatty v. Metropolitan St. Louis Sewer District,* 867 S.W.2d 217 (Mo. banc 1993) (Beatty II);

   b. MSD has received a five percent return since 1993 on the approximately forty million dollars it retained to cover a refund of the illegal tax;

   c. Missouri precedent requires utilities to pay interest on illegally collected taxes. *See State ex rel. Utility Consumers Council of Missouri, Inc. v. Pub-*

lic Service Com'n of Missouri, 602 S.W.2d 852 (Mo.App. W.D. 1980);

d. MSD failed to present any evidence regarding the underlying facts supporting the strength of its defenses.

2. A question of general interest and importance exists as to whether a plaintiff class is adequately represented when class counsel acquiesces to a settlement such as the one set forth above.

3. Whether unnamed taxpayer class members must be granted intervention in order to appeal the settlement of their claims for recovery of taxes collected in violation of the Hancock Amendment. In a case of first impression under Missouri law, this Court held that unnamed class members must intervene to have appellate standing. Some federal courts, however, have held that unnamed class members are only required to file objections in order to have appellate standing. *See Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977).

4. Whether a class action settlement of taxpayers' Hancock Amendment claims which requires class members, rather than a governmental unit such as the Metropolitan St. Louis Sewer District ("MSD"), to pay class counsel's attorneys' fees violates Article X, § 23 of the Missouri Constitution.

5. Assuming, *arguendo*, that unnamed class members who file objections to a class settlement responsive to judicial notice are also required to successfully intervene to appeal a class action settlement in Missouri, whether Missouri courts should adopt a liberal policy of

intervention which would have allowed the Barnes-Jewish Class Members the opportunity to challenge the settlement of their Hancock Amendment claims in this case. *See Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877 (7th Cir. 2000).

6. Whether a utility's obligation to pay interest on unconstitutional taxes should be taken into account in determining the fairness, reasonableness, and adequacy of a settlement of taxpayers' Hancock Amendment claims. The Court of Appeal's Opinion did not address the issue of how Defendant MSD's obligation to pay interest on the unconstitutional taxes impacted the settlement analysis.

7. Whether requiring unnamed class members to successfully intervene in order to have appellate standing to challenge a trial court's approval of a class action settlement violates the due process clauses of the Fourteenth Amendment to the United States Constitution and Section 10 of Art. I of the Missouri Constitution.

8. Whether the denial of the Barnes-Jewish Class Members' Motion to Intervene was an abuse of discretion because the denial infringed the Barnes-Jewish Class Members' due process rights under the Fourteenth Amendment to the United States Constitution and Section 10 of Art. I of the Missouri Constitution.

Statement of Facts

The underlying appeal involves a challenge by dissenting class members to the trial court's approval of a class action settlement that reduces the taxpayer class members' recovery by more than $40 million dollars. (TR 13) The appellants are five large use customers of the MSD: Barnes-Jewish Hospital, Unity HealthCare System, SSM HealthCare System, Emerson Electric Company and Daimler Chrysler Corporation ("Barnes-Jewish Class Members"). (LF 311-15) The hospital and healthcare systems are all not-for-profit corporations. (TR 17) Barnes-Jewish Class Members, along with another group of dissenting class members ("Roberts Class Members"), sought judicial review of the trial court's approval of a class action settlement of a suit against the MSD. (LF 340-41)

On May 13, 1992, the MSD enacted Ordinance No. 8657, substantially increasing the residential and nonresidential sewer service charges for one year, from July 1, 1992 through June 30, 1993 in an attempt to generate additional revenue of approximately $40 million. (LF 18, 257) Following this action, a group of customers filed suit to enjoin the proposed rate increase because it violated Article X, section 22(a) of the Missouri Constitution. *Beatty II,* 867 S.W.2d at 219. (Article X, §§ 16-24 of the Missouri Constitution is commonly referred to as the "Hancock Amendment.") The *Beatty II* trial court rejected the arguments of the complaining customers of the utility and ultimately the case was transferred by the court of appeals to the Missouri Supreme Court for a decision. *Id.* at 218.

In *Beatty II*, the Missouri Supreme Court held that a rate increase implemented by the MSD in 1992 was unconstitutional because MSD did not seek voter approval as required by Article X, § 22(a) of the Missouri Constitution. 867 S.W.2d at 221; (LF 32) In *Beatty v. Metropolitan St. Louis Sewer District*, 914 S.W.2d 791, 795 (Mo. banc 1995) (*"Beatty III"*), the Missouri Supreme Court suggested that the proper method for MSD customers to recover the illegal charges, absent, of course, a refund from MSD, would be by means of a class action lawsuit. The total amount of the illegal charges was approximately $39.7 million. (LF 257) On remand the Beatty plaintiffs received a one hundred percent credit of the illegal charges that they paid. (TR 11), (LF 33)

The plaintiffs-respondents ("plaintiffs") in this case are a group of individuals and corporate customers of the defendant-respondent, MSD. (LF 16-18) The plaintiffs filed a class action lawsuit seeking restitution of the unlawful charges that MSD collected pursuant to Ordinance No. 8657 from July 1, 1992 through June 30, 1993. (LF 16-22; 257) After crediting delinquent accounts by the full amount of the rate increase, the remaining unlawful charges were approximately $38,300,000. (LF 33, 257) (TR 43)

MSD moved to dismiss the plaintiffs' lawsuit on the grounds that the plaintiffs had not followed the procedures for payment of protested taxes in section 139 of the Missouri Revised Statutes and that plaintiffs' claims were barred by the doctrine of sovereign immunity. *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716, 719 (Mo.banc 1998). The trial court ruled in favor of MSD and the case was appealed and transferred to the Missouri Supreme Court. *Id.* at 717. The Missouri Supreme Court reversed the trial court and rejected MSD's arguments in support of its motion to dismiss. *Id.*

After the Missouri Supreme Court remanded the case, the plaintiffs, MSD, and their respective counsel agreed to a mediated settlement in which MSD would create a reduced refund pool of $30,140,000 from which the plaintiffs' attorneys would receive a fee in the amount of $4,521,000. (LF 39, 126) The remaining $25,619,000 amount would be distributed among MSD's 420,000 customers. (LF 44-48, 19) The settlement made no provision for the payment of prejudgment interest. (TR 107)

On August 27, 1999, the trial court approved the Conditional Stipulation of Class Settlement ("Stipulation"). (LF 86-94) The Stipulation conditionally certified, on a non-opt basis, the class of all MSD customers who were charged for wastewater sewer service under Ordinance No. 8657 from July 1, 1992 through June 30, 1993. (LF 34-36, 41-44, 87-88) The trial court also scheduled a hearing on approval of the settlement for November 1, 1999 and directed the parties to provide notice of the proposed settlement and class certification directly to MSD's current customers and also by publication. (LF 87, 89-90)

The Barnes-Jewish Class Members, as members of the conditionally certified class, filed and served their written objections to the proposed settlement on October 25, 1999. (LF 263-67, 291-310, TR 17) The Barnes-Jewish Class Members raised numerous issues in their objections and at the hearing held on November 1, 1999 regarding the fairness of the proposed settlement. (LF 263-67) (TR 152-56) Plaintiffs' class counsel testified under cross-examination that he had previously demanded statutory interest at the rate of nine percent from MSD-an amount of about $25,000,000. (TR 401-06) Plaintiff's class counsel stated that he had a strong claim for prejudgment interest at five percent because in discovery he learned that MSD receives a five-percent return on its general deposits. (TR 105) One of the class representatives testified that under the settlement the class sacrificed one hundred percent of the prejudgment interest claim. (TR 54-55)

The Barnes-Jewish Class Members also attempted to intervene in the case. (LF 311 -316) On December 27, 1999, the trial court approved the settlement and denied the Barnes-Jewish Class Members' Motion to Intervene.

(LF 329-339) The Barnes-Jewish Class Members appealed this decision.

Fairness, Reasonableness, and Adequacy of Class Action Settlements

1. A question of general interest and importance exists as to what constitutes a fair, reasonable, and adequate class action settlement under Missouri law. Although no Missouri Supreme Court case law is directly on point, persuasive federal authority states that the most important factor in the trial court's fairness analysis is "the strength of the case for plaintiffs on the merits balanced against the amount offered in the settlement." *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 124 (8th Cir. 1975). In the instant case, the settling parties failed to present substantial evidence that the significant discount of the plaintiff class' claims were justified given the strength of plaintiff's claims.

2. The strength of the plaintiffs' claim in the instant case is overwhelming and irrefutable. In *Beatty II,* the Missouri Supreme Court unequivocally held that MSD's 1992-1993 wastewater disposal increase under Ordinance No. 8657 was unconstitutional because MSD did not seek voter approval as required by Article X, § 22(a) of the Missouri Constitution. 867 S.W.2d at 221. MSD concedes this point. (LF 25) Further, MSD has profited handsomely from its Hancock violation because it has retained approximately $40 million of the illegal charges in an account bearing interest at five percent since 1993. (TR 105; LF 278) At the statutory rate of nine percent, the principal and interest of MSD's funds are in excess of $70 million; at the rate of five percent, MSD's funds exceed $55 million. The settlement agreement discounts the class recovery to $25.6 million — an astounding

reduction of fifty-two percent from the five percent calculation and sixty-three percent reduction from the nine percent calculation.

3. The record is devoid of any substantial evidence supporting such a massive reduction of the plaintiffs' Hancock Amendment claims. Under Missouri law, a utility is required to pay interest from the date of an unlawful collection. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Com'n of Missouri*, 602 S.W.2d 852 (Mo.App. W.D. 1980). The Court's opinion states that "[t]estimony concerning MSD's defenses was offered at the fairness hearing." (Opinion at p.8). MSD, however, presented no evidence at the hearing on any aspect of the settlement. The Court's Opinion overlooks the issue of how MSD's obligation to pay interest on the unconstitutional tax impacts the fairness evaluation of the settlement.

4. Determining the legal strength of a defendant's defenses is a matter within the province of a court. For example, MSD's two main arguments-that sovereign immunity bars the payment of interest and that plaintiffs are not permitted to bring a class action for a tax refund-are severely undermined by two Missouri Supreme Court decisions arising from MSD's collection of the illegal taxes. In *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716 (Mo.banc 1998), the Missouri Supreme Court reversed the appellate and trial courts and held that sovereign immunity did not bar the plaintiffs' claim. Finally, in *Beatty v. Metropolitan St. Louis Sewer District,* 969 S.W.2d 716 (Mo.banc 1995), the Missouri Supreme Court suggested that a class action would be the appropriate mechanism for MSD's customers to recover the illegal tax.

5. The Barnes-Jewish Class Members provided evidence to the trial court that the approval of the class action settlement provides a perverse incentive for MSD and similarly situated governmental entities to blithely ignore the Hancock Amendment's requirements and then engage in recalcitrant litigation tactics. In other words, MSD bears responsibility for lost or unidentifiable class members. The fact that MSD customers are lost over time should not be a factor supporting the fairness of the settlement since MSD is the cause of the problem.

Inadequate Representation

6. The Barnes-Jewish Class Members' reasons for asserting inadequacy of representation are synonymous with their objections: namely, the settlement is not fair, reasonable, or adequate given the unjustified discount of the settlement amount, and the settlement violates the Hancock Amendment's requirement that the applicable government unit pay the plaintiffs' attorneys' fees. In this case, the issue of adequacy of representation is inextricably linked to the issue of whether the settlement was fair, reasonable, and adequate. *See e.g., White v. National Football League,* 41 F.3d 402, 408 (8th Cir. 1994) (stating that the "adequacy of class representation . . . is ultimately determined by the settlement itself"). Clearly, the representation of the existing parties would be deemed inadequate if they acquiesced to an unreasonable or unconstitutional settlement.

Settlement Violates Hancock Amendment

7. The instant appeal raises a Hancock Amendment question of general interest and importance in Missouri jurisprudence; namely, whether the Hancock Amendment prohibits class action settlements that provide for

attorneys' fees to be paid by the taxpayers and not the government. The Court of Appeal's Opinion does not address the merits of the Barnes-Jewish Class Members' claim that the settlement in this case violates the Hancock Amendment because it requires the class members to pay attorneys' fees in the amount of $4,521,000. An appellate court employs a *de novo* standard of review for questions of law and independently considers the evidence and reaches its own conclusions. *Waldorf Inv. Co. v. Farris*, 918 S.W.2d 915, 919 (Mo.App. S.D. 1996).

8. The plain meaning of section 23 of the Hancock Amendment provides that if a Hancock plaintiff's suit is sustained, the applicable unit of government is responsible for paying the plaintiff's attorneys' fees. In the instant case, the plaintiff class was the prevailing party. In fact, given the *Beatty II* court's holding that MSD charges under Ordinance No. 8657 were illegal, the plaintiff class' prevailing party status was preordained. The fact that the parties settled this case does not affect the plaintiff class' prevailing party status. *See e.g., Wirken v. Miller*, 978 S.W.2d 60, 64 (Mo.App. W.D. 1998) (stating that there is "no authority for the proposition that a case must be tried to conclusion before any party can claim to be a prevailing party"). In fact, in the only reported Hancock Amendment case interpreting section 23's phrase "the applicable unit of government," the plaintiff was awarded attorney's fees even though the trial court dismissed its claim as moot. *Gilroy-Sims & Assoc. v. Downtown St. Louis Business District,* 729 S.W.2d 504 (Mo.App. E.D. 1987)

Standing of Unnamed Class Members

9. A question of general interest and importance is presented as to whether Missouri jurisprudence should

require unnamed class members to intervene in order to obtain appellate standing. As the Court of Appeal's Opinion noted, this case presents an issue of first impression under Missouri law and federal authorities are divided. Transfer to the Missouri Supreme Court is warranted because the intervention requirements established by the Court of Appeal's Opinion will have a profound effect on the ability of unnamed class members to challenge class action settlements. Persuasive federal authority does not require intervention to preserve appellate standing. *See Carlough v. Amchem Products Inc.*, 5 F.3d 707 (3d Cir. 1993); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977). In these cases, the courts found that class members who filed objections to a proposed settlement had standing to appeal the approval of a settlement. This better reasoned approach limits appeals to those class members who have properly presented their objections prior to the fairness hearing without unduly restricting the ability of unnamed class members to contest the trial court's approval of the settlement. The *Carlough* and *Marshall* decisions recognize that unnamed class members are, in a sense, putative parties: unnamed class members, especially in the non-opt out context, have intrinsic stakes in the litigation.

10. Even if Missouri courts were to follow the more restrictive line of authority that requires intervention as a requirement for unnamed members to have appellate standing, a question of general interest and importance exists as to whether Missouri courts should adopt a liberal standard for intervention in the context of unnamed class members. For example, the Seventh Circuit requires intervention as a prerequisite for appellate standing but freely allows intervention in the class action context. As the Seventh Circuit noted, "Because

only parties may appeal, it is vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision." *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 881 (7th Cir. 2000).

11. In the instant case, the trial court forced the Barnes-Jewish Class Members into a non-opt class. As members of the class, they exercised every means of opposition possible to the proposed settlement, including filing objections and cross-examining witnesses at the fairness hearing. Even if the trial court had allowed the Barnes-Jewish Class Members to intervene, they would have had no greater rights than those they exercised by objecting to the proposed settlement. *See Crawford,* 201 F.3d at 881 (noting that an objecting intervenor cannot prevent the approval of a class action settlement; only the class representative's assent is necessary). Thus, intervention in the context of unnamed class members is simply a formality to preserve appellate review. In the instant case, however, the trial court denied intervention and shielded the class action settlement from the full scope of appellate review.

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Certificate of Service

The undersigned certifies that a true and accurate copy of the forgoing was served, by first class, United States mail, postage prepaid, this 7th day of March, 2001 upon the following individuals:

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IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

NO. ED 77467

Consolidated with NO. ED 77469

ROBERT A. RING, 6024 WASHINGTON AVENUE, INC., CHAMP SPRING CO., KICKHAM BOILER AND ENGINEERING, INC., VIKING LODGE AND RESTAURANT, INC., APARTMENT EXCHANGE, INC., and MICHAEL F. KICKHAMM SR.,
Plaintiffs-Respondents

v.

THE METROPOLITAN ST. LOUIS SEWER DISTRICT,
a political subdivision and municipal corporation,
Defendant-Respondent

BARNES-JEWISH HOSPITAL, DAIMLER-CHRYSLER CORPORATION, EMERSON ELECTRIC CO., SSM HEALTHCARE, and UNITY HEALTH SYSTEM,
Appellants

and

MARK D. ROBERTS, STEVEN OBERG, and GRETCHEN WILLIAMS,
Appellants

On appeal from the Circuit Court
of the City of St. Louis
Cause No. 954-02764
The Honorable David A. Dolan, presiding

BRIEF OF APPELLANTS' BARNES-JEWISH, ET AL

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JURISDICTIONAL STATEMENT

This action is an appeal by Barnes-Jewish Hospital, Unity HealthCare System, SSM HealthCare System, Emerson Electric Company and DaimlerChrysler Corporation from a December 27, 1999 judgment of the Circuit Court of the City of St. Louis approving a class action settlement of a suit against the Metropolitan St. Louis Sewer District. The appellants are objecting class members who also appeal the trial court's denial of their motion to intervene.

This appeal is not exclusively within the jurisdiction of the Missouri Supreme Court. Therefore, jurisdiction lies in the Missouri Court of Appeals, Eastern District pursuant to Article 5, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

This appeal involves an amount in dispute of more that $43 million[1] in refunds that are due to customers of the Metropolitan St. Louis Sewer District ("MSD"). (TR 13) The appellants are five large use customers of the MSD: Barnes-Jewish Hospital, Unity HealthCare System, SSM HealthCare System, Emerson Electric Company and DaimlerChrysler Corporation ("Barnes-Jewish Class Members"). (LF 311-15) The hospital and healthcare systems are all not-for-profit corporations. (TR 17) In this appeal, the Barnes-Jewish Class Members, along with another group of dissenting class members ("Roberts Class Members"), are seeking judicial review of the trial court's approval of a class action settlement of a suit against the MSD. (LF 340-41)

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[1] The $43 million amount is derived from the difference between the net class action settlement amount and the amount that the plaintiff class would recover if it was completely successful in pursuing its claim.

The MSD is a utility organized as a political subdivision of the state of Missouri that provides sanitary sewer, waste and storm water services in the city and county of St. Louis. *Beatty v. Metropolitan St. Louis Sewer District*, 867 S.W.2d 217, 218 (Mo. banc 1993) (*"Beatty II"*)[2]; (LF 18) It provides these utility services to approximately 420,000 customers and is, therefore, one of the largest utilities in the state of Missouri. *Beatty II,* 867 S.W.2d at 218; (TR *156)* It is a self-regulating utility and is not subject to the jurisdiction of the Missouri Public Service Commission or any other utility regulatory body. (TR 156)

On May 13, 1992, the MSD enacted Ordinance No. 8657, substantially increasing the residential and non-residential sewer service charges for one year, from July 1, 1992 through June 30, 1993 in an attempt to generate additional revenue of approximately $40 million. (LF 18, 257) Following this action, a group of customers filed suit to enjoin the proposed rate increase on the ground that it violated article 10, section 22(a) of the Missouri Constitution. *Beatty II,* 867 S.W.2d at 219. The *Beatty II* trial court rejected the arguments of the complaining customers of the utility and ultimately the case was transferred by the court of appeals to the Missouri Supreme Court for a decision. *Id.* at 218.

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[2] Prior to the *Beatty II* decision, Mr. Beatty asserted that a previous MSD rate increase and bond issuance violated the Hancock Amendment. The Missouri Court of Appeals reversed the trial court and ruled in favor of Mr. Beatty. This decision is reported as *Beatty v. Metropolitan St. Louis Sewer District,* 731 S.W.2d 318 (Mo.App. E.D. 1987) (en banc) and referred to by the *Beatty II* court as "*Beatty I.*"

In *Beatty II,* the Missouri Supreme Court held that a rate increase implemented by the MSD in 1992 was unconstitutional because MSD did not seek voter approval as required by Article X, § 22(a) of the Missouri Constitution. 867 S.W.2d at 221; (LF 32) In *Beatty v. Metropolitan St. Louis Sewer District*, 914 S.W.2d 791, 795 (Mo. banc 1995) ("*Beatty III*"), the Missouri Supreme Court suggested that the proper method for MSD customers to recover the illegal charges, absent, of course, a refund from MSD, would be by means of a class action lawsuit. The total amount of the illegal charges was approximately $39,700,000. (LF 257) On remand the Beatty plaintiffs received a one hundred percent credit of the illegal charges that they paid. (TR 11), (LF 33)

The plaintiffs-respondents ("plaintiffs") in this case are a group of individuals and corporate customers of the defendant-respondent, MSD. (LF 16-18) The plaintiffs filed a class action lawsuit seeking restitution of the unlawful charges that MSD collected pursuant to Ordinance No. 8657 from July 1, 1992 through June 30, 1993. (LF 16-22; 257) After crediting delinquent accounts by the full amount of the rate increase, the remaining unlawful charges were approximately $38,300,000. (LF 33, 257) (TR 43)

MSD moved to dismiss the plaintiffs' lawsuit on the grounds that the plaintiffs had not followed the procedures for payment of protested taxes in section 139 of the Missouri Revised Statutes and that plaintiffs' claims were barred by the doctrine of sovereign immunity. *Ring v. Metropolitan St. Louis Sewer District,* 969 S.W.2d 716, 719 (Mo.banc 1998). The trial court ruled in favor of MSD and the case was appealed and transferred to the Missouri Supreme Court. *Id.* at 717. The Missouri Supreme

Court reversed the trial court and rejected MSD's arguments in support of its motion to dismiss. *Id.*

After the Missouri Supreme Court remanded the case, the plaintiffs, MSD, and their respective counsel agreed to a settlement in which MSD would create a reduced refund pool of $30,140,000 from which the plaintiffs' attorneys would receive a fee in the amount of $4,521,000. (LF 39, 126) The remaining $25,619,000 amount would be distributed among MSD's 420,000 customers. (LF 44-48, 19) The settlement made no provision for the payment of prejudgment interest. (TR 107) The Barnes-Jewish Class Members received no notice of the settlement negotiations. (TR 16) On August 27, 1999, the trial court approved the Conditional Stipulation of Class Settlement ("Stipulation"). (LF 86-94) The Stipulation conditionally certified, on a non-opt basis, the class of all MSD customers who were charged for wastewater sewer service under Ordinance No. 8657 from July 1, 1992 through June 30, 1993. (LF 34-36, 41-44, 87-88) The trial court also scheduled a hearing on approval of the settlement for November 1, 1999 and directed the parties to provide notice of the proposed settlement and class certification directly to MSD's current customers and also by publication. (LF 87, 89-90)

The Barnes-Jewish Class Members, as members of the conditionally certified class, filed and served their written objections to the proposed settlement on October 25, 1999. (LF 263-67, 291-310, TR 17) The Barnes-Jewish Class Members raised numerous issues in their objections and at the hearing held on November 1, 1999 regarding the fairness of the proposed settlement. (LF 263-67) (TR 152-56) Plaintiffs' class counsel testified under cross-examination that he had previously demanded statutory interest at the rate of nine percent from MSD — an amount of about $25,000,000. (TR 401-06) Plaintiff's class counsel stated that he had a strong claim for prejudgment interest at five percent because in discovery he learned that MSD receives a five-percent return on its general deposits. (TR 105) One of the class representatives testified that the class sacrificed one hundred percent of the prejudgment interest claim. (TR 54-55) Interest accrued through May 19, 2000 is approximately $31,000,000.[3]

The Barnes-Jewish Class Members also attempted to intervene in the case. (LF 311-316) On December 27, 1999, the trial court approved the settlement and denied the Barnes-Jewish Class Members' Motion to Intervene. (LF 329-339)

POINTS RELIED ON

I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN APPROVING THE CLASS ACTION SETTLEMENT BECAUSE THE CLASS ACTION SETTLEMENT WAS NOT FAIR, REASONABLE, AND ADEQUATE, AS REQUIRED UNDER MISSOURI LAW, IN THAT THE CLASS ACTION SETTLEMENT UNFAIRLY AND UNREASONABLY REDUCED THE PLAINTIFF CLASS' DAMAGE CLAIM.

Mo. Const. Art. X, § 22(a)

Beatty v. Metropolitan St. Louis Sewer District, 867 S.W.2d 217 (Mo. banc 1993)

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[3] This interest amount is calculated at the statutory rate of nine percent from July 15, 1993 (the last date that MSD assessed the unconstitutional charges under Ordinance No. 8657) through the present date.

Beatty v. Metropolitan St. Louis Sewer District, 914 S.W.2d 791 (Mo. banc 1995)

Ring v. Metropolitan St. Louis Sewer District, 969 S.W.2d 716 (Mo.banc 1998)

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Mo. Const. Art. X, § 23

Mo. Const. Art. X, § 22(a)

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III. THE TRIAL COURT ERRED IN DENYING THE BARNES-JEWISH CLASS MEMBERS' MOTION TO INTERVENE BECAUSE INTERVENTION WAS WARRANTED PURSUANT TO MISSOURI SUPREME COURT RULE 52.12(A), THE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE BARNES-JEWISH CLASS MEMBERS HAD INTERESTS IN REFUND

AMOUNTS THAT WERE SUBJECT TO THE CLASS ACTION SETTLEMENT, THEIR INTERESTS WERE IMPAIRED BY THE CLASS ACTION SETTLEMENT, AND THEIR INTERESTS WERE NOT ADEQUATELY REPRESENTED AS EVIDENCED BY THE UNFAIR DISCOUNT OF THEIR CLAIMS.

White v. National Football League, 41 F.3d 402 (8th Cir. 1994)

Borgard v. Integrated Nat'l Life Ins. Co., 954 S.W.2d 532 (Mo.App. E.D. 1997)

Long v. Seeley, 975 S.W.2d 208 (Mo.App. E.D. 1998)

I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN APPROVING THE CLASS ACTION SETTLEMENT BECAUSE THE CLASS ACTION SETTLEMENT WAS NOT FAIR, REASONABLE, AND ADEQUATE, AS REQUIRED UNDER MISSOURI LAW, IN THAT THE CLASS ACTION SETTLEMENT UNFAIRLY AND UNREASONABLY REDUCED THE PLAINTIFF CLASS' DAMAGE CLAIM.

In reviewing a trial court's approval of a class action settlement, appellate courts employ an abuse of discretion standard of review. *Van Horn v. Trickey,* 840 F.2d 604, 607 (8th Cir. 1988). Parties to a class action may not dismiss or compromise the lawsuit without the approval of the court. *Missouri Supreme Court Rule* 52.08(e) (1999). Before approving a class action settlement, the trial court must assess whether the proposed settlement is "fair, reasonable, and adequate." *Van Horn,* 840 F.2d at 606. A trial court must consider the following factors in making this determination: "the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further litigation; the amount of opposition to the settlement." *Id.* at 707. The most important factor in the trial court's fairness analysis is "the strength of the case for plaintiffs on the merits balanced against the amount offered in the settlement." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975). Additionally, opposition from proposed class members militates against a finding that any proposed settlement is "fair and reasonable." *Grantham v. J.L. Mason Group*, 811 F. Supp. 1386, 1390 (E.D.Mo. 1993).

A. *The Strength of the Plaintiffs' Claims Indicates a Virtual Certainty of Obtaining a Significantly Greater Recovery Than the Settlement Provides.*

The strength of the plaintiffs' claim in the instant case is overwhelming and irrefutable. In *Beatty II,* the Missouri Supreme Court unequivocally held that MSD's 1992-1993 wastewater disposal increase under Ordinance No. 8657 was unconstitutional because MSD did not seek voter approval as required by Article X, § 22(a)[4] of the Missouri Constitution. 867 S.W.2d at 221. MSD concedes this point. (LF *25)* Thus, the status of these charges is not in issue: MSD is retaining approximately $40 million of illegal charges and has been earning interest on those charges. (TR 105)

The importance of the *Beatty II* decision in relation to analyzing the fairness of the proposed settlement cannot be overstated. Seldom, if ever, does a class action lawsuit proceed from a stronger foundation than did the present one: *Beatty II* declared the wastewater disposal charges unconstitutional; *Beatty III* complemented *Beatty II* by suggesting that a class action was the proper mechanism to redress MSD's unconstitutional act. 914 S.W.2d at 795.

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[4] Article X, §§ 16-24 of the Missouri Constitution is commonly referred to as the "Hancock Amendment."

Although the *Beatty II* court held that Ordinance No. 8657 raised revenue in violation of the Hancock Amendment, the *Beatty III* court refused to invalidate its provision that the overpayment of charges could be used by MSD as a set-off against any charges owed to MSD. 914 S.W.2d at 799. On remand, the Beatty plaintiffs received a one hundred percent credit for the illegal charges that they paid. After crediting delinquent accounts, MSD has retained approximately $38,300,000 of the illegal charges. (LF 257) Because the Hancock Amendment requires that the applicable unit of government pay the attorneys' fees (as more fully explained in the point II), no possible justification exists for discounting the plaintiff class' recovery from the full $38,300,000 in illegal charges. After deducting attorneys' fees, however, the plaintiff class in this case will receive only $25,619,000 — a thirty-three percent reduction from the principal amount of the unlawful rate increase. (LF 293)

Even more egregious is the settlement's failure to account for the plaintiff class' compelling claim for prejudgment interest. As a utility serving approximately 420,000 customers, MSD is one of the largest utilities in the state. Under Missouri law, a utility is required to pay interest from the date of an unlawful collection. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Com'n of Missouri,* 602 S.W.2d 852 (Mo.App. W.D. 1980). In *Utility Consumers,* the Missouri Court of Appeals considered whether utilities had to pay interest on a surcharge that was ruled improper. The *Utility*

Consumers court analogized the refund of an improper surcharge to restitution of property acquired under an erroneous judgment. *Id.* at *855.* In both cases, the court stated that interest should run from the time of the seizure or collection. *Id.* at 855-56. In ordering that the utilities pay interest at the statutory rate from the time the illegal surcharges were collected, the court stated that "[a]ny later date would leave the consumers uncompensated for the loss of use of their money." *Id.* at 856. The *Utility Consumers* court's reasoning that the payment of illegal surcharges is similar to the refund of property acquired under an erroneous judgment echoes the *Beatty II* court's statement that the "appellants be restored to all things which they have lost by reason of the said judgment." *Beatty III*, 914 S.W.2d at 796.

Under cross-examination, plaintiffs' counsel admitted that he originally made a demand for statutory interest at the rate of nine percent since the date of collection. (TR 106) Plaintiffs' counsel testified that the amount of prejudgment interest he sought was about twenty-five million dollars. (TR 106) As of the date of this appeal, prejudgment interest at the rate of nine percent compounded yearly would be in excess of $30,000,000. As one of the class representatives admitted under cross examination, the class representatives sacrificed one hundred percent of the prejudgment interest claim even though they believed that their chances of prevailing on the prejudgment interest claim was greater than zero percent. (TR 54-55). In fact, plaintiffs' counsel conceded that he had a very strong claim for prejudgment interest at five percent because in discovery he learned that MSD receives a five-percent return on its general deposits. (TR 105) After prejudgment interest in the amount of $30,000,000 is added to the illegal charges held by MSD, the $25,619,000 net settlement fund represents a sixty-three percent reduction from the $69,220,949 due to the plaintiff class.

When viewed in light of the plaintiffs' strong claim for the prejudgment interest, the proposed settlement appears especially unfair. Consider the following chart:

Interest Rate	Illegal Charges	Interest Amount
Nine percent[5]	$38,304,374	$30,916,575.43
Five percent	$38,304,374	$15,219,989.23

Total Recovery	Net Settlement ($25,619,000) Reduction %
$69,220,949.43	63%
$53,524,363.23	*52%*

The proposed settlement amount thus represents a *sixty-three percent discount* from "complete success" (illegal charges + nine percent) and a fifty-two percent discount from what plaintiffs' class counsel concedes is a strong claim (illegal charges + five percent). (TR 105)

B. *MSD's Defenses Provide No Basis for Discounting Plaintiffs' Claims.*

The record before this court is devoid of any compelling reason for discounting the settlement fund from approximately $69 million to *$25.6* million. MSD failed to present any testimony at the fairness hearing or file any affidavits or pleadings regarding the strength of its defenses. In weighing the amount of the proposed settlement with the strength of the plaintiffs' case, the issue is not whether MSD has defenses but whether they are comparatively strong defenses in relation to the plaintiffs' claim. For example, in *Clement v. American Honda Finance Corp.*, 176 F.R.D. 15 (D.Conn. 1997), the parties argued that the settlement amount was adequate, fair, and reasonable because of weaknesses in the plaintiff's case. After examining the plaintiff's claims, however, the court rejected this argument and held that the settlement amount was too low based upon the strength of plaintiffs' claims. *Id.* at 24-25.

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[5] These interest amounts are compounded yearly and calculated from July 15, 1993 (the last date that MSD assessed the unconstitutional charges under Ordinance No. 8657) through the present date.

The weakness of MSD's defenses is verified by the affirmative defenses that MSD filed in its Answer. (LF 28-30) For example, MSD asserts that sovereign immunity bars the payment of interest from the date of collection. In *Ring*, however, the Missouri Supreme Court rejected MSD's contention and held that the Hancock Amendment operates as a waiver of sovereign immunity. 969 S.W.2d at 719. Likewise, MSD asserts that plaintiffs are not permitted to bring a class action suit for a tax refund. Such an argument is substantially weakened by *Beatty III's* and Ring's suggestion that a class action would be appropriate in this case. 969 S.W.2d at 719, 914 S.W.2d at 795. Indeed, given *Beatty III's* holding that the plaintiffs' lawsuit did not have the effect of a taxpayer representative suit, a class action would be the only method for the other ratepayers to force MSD to disgorge the unconstitutional charges, absent a multitude of individual lawsuits. Thus, MSD's sovereign immunity and class action certification defenses are tenuous at best.

MSD's statute of limitations defense is based upon the limitations periods provided for taxpayer protest suits in chapters 136 and 139 of the Missouri Revised Statutes. The *Ring* court, however, held that the plaintiffs' cause of action was based upon the Hancock Amendment and not under the statutory provisions for a taxpayer protest suit. 969 S.W.2d at 719. Similarly, MSD's affirmative defense that it is not equitable to refund taxes voluntarily paid but illegally collected was found in *Ring* to be inapplicable because the Hancock Amendment provides a mechanism for recouping illegal taxes. *Id.*

MSD's defense of laches is also without merit. Laches requires that a party with knowledge of the facts giving rise to his or her rights delay assertion of them for an excessive time to the legal detriment of the other party. *Port Perry Marketing Corp. v. Jenneman,* 982 S.W.2d 789 (Mo.App. E.D. 1998). The delay must be unreasonable and unexplained. *Id.* The plaintiffs in this case filed suit within days of the *Beatty III* decision in which the court suggested that a class action lawsuit would be the proper mechanism to obtain refunds for MSD's customers. Moreover, MSD cannot possibly claim legal detriment because the Beatty plaintiffs filed suit immediately to enjoin MSD's collection of the charges and MSD was therefore on notice of the unconstitutional nature of the charges it collected from Ordinance No. 8657.

MSD also claims that it is entitled to a set-off or recoupment because it spent the illegal taxes for the benefit of the customers. MSD presented no evidence of such expenditures at the hearing, and, in any event, such a position would undermine the Hancock Amendment's goal of limiting expenditures to those that are constitutionally authorized. Likewise, MSD presented no evidence in support of its defense that the collection of the charges from non-residential users was not unconstitutional.

Finally, plaintiffs' counsel and MSD allude to language in *Ring* to the effect that this court should "fashion a remedy that will acknowledge both the taxpayers' rights under article X, section 22(a) [Hancock Amendment], and the important obligations that MSD bears under the environmental laws of the nation and state." 969 S.W.2d at 719. At the hearing, the class representatives and plaintiffs' class counsel gave great weight to this cryptic language. (TR 39, 68) This language is unclear at best and can be used to support or reject any type of settlement. In any event, this language is dictum and has no binding effect. Certainly the statement does not support a sixty-three percent reduction of the plaintiffs' claim.

Thus, after assessing the strength of plaintiffs' claims and the comparative weakness of MSD's defenses, the trial court erred and abused its discretion in approving the settlement.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN APPROVING THE CLASS ACTION SETTLEMENT BECAUSE THE CLASS ACTION SETTLEMENT PROVIDES FOR PAYMENT OF ATTORNEYS' FEES FROM THE PLAINTIFF CLASS' SETTLEMENT FUND IN VIOLATION OF ARTICLE X, § 23 OF THE MISSOURI CONSTITUTION WHICH REQUIRES THAT COSTS, INCLUDING REASONABLE ATTORNEYS' FEES, BE PAID BY THE APPLICABLE UNIT OF GOVERNMENT.

In 1980, Missouri voters enacted an amendment to the Missouri Constitution that constrained the ability of state and local governments to raise revenue. *Kelly v. Hanson*, 984 S.W.2d 540, 543 (Mo.App. W.D. 1998); Mo.

Const., Art. X, §§ 16-24. This amendment is commonly known as the "Hancock Amendment." *Id.* The central purpose of the Hancock Amendment is "to rein in increases in governmental revenue and expenditures." *Missourians For Tax Justice Educ. Project v. Holden,* 959 S.W.2d 100, 102 (Mo. 1997). The Hancock Amendment "reveals the voters' basic distrust of the ability of representative government to keep its taxing and spending requirements in check." See *Beatty II,* 867 S.W.2d at 221 (Mo. banc 1993).

MSD's illegal 1992 rate increase has already spawned three Hancock Amendment decisions by the Missouri Supreme Court. In *Beatty II*, the court held that the rate increase violated § 22(a) of the Hancock Amendment because MSD enacted the rate increase without voter approval. 867 S.W.2d at 221. In *Beatty III*, the court held that only the named plaintiffs were entitled to a refund of the rate charges and opined that a class action would be the proper mechanism for refunding the illegal charges. 914 S.W.2d at 795-97. Finally, in the instant case, the Missouri Supreme Court held that the plaintiff class' Hancock Amendment claims were not barred by MSD's sovereign immunity defense. *Ring*, 969 S.W.2d at 719.

The instant appeal raises a Hancock Amendment issue of first impression in Missouri jurisprudence; namely, whether the Hancock Amendment prohibits class action settlements that provide for attorneys' fees to be paid by the taxpayers and not the government. Section 23 of the Hancock Amendment states as follows:

> Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county, or other political subdivision shall have standing to

> bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive, of this article and, if the suit is sustained, shall receive from the *applicable unit of government his costs, including reasonable attorneys' fees* incurred in maintaining such suit.

Mo. Const. Art. X, § 23 (emphasis added).

The Barnes-Jewish Class Members appeal from the trial court's approval of a settlement in which plaintiff's counsel's fees are paid from the plaintiff class' settlement fund and not by MSD. Whether the approval of this class action settlement violates the Hancock Amendment is a question of law. An appellate court employs a *de novo* standard of review for questions of law and independently considers the evidence and reaches its own conclusions. *Waldorf Inv. Co. v. Farris*, 918 S.W.2d 915, 919 (Mo.App. S.D. 1996).

The plain meaning of section 23 of the Hancock Amendment provides that if plaintiff's suit is sustained, the applicable unit of government is responsible for paying the plaintiff's attorneys' fees. Because the Hancock Amendment is not self-enforcing, i.e., private litigants enforce it by initiating lawsuits, the attorneys' fee provision is an integral component of the Hancock Amendment's mandate to regulate a taxing authority's ability to raise taxes. Consequently, a trial court has no discretion in whether to award attorneys' fees to a successful Hancock plaintiff. For example, in *Avanti Petroleum, Inc. v. St. Louis County*, 974 S.W.2d 506, 513 (Mo.App. E.D. 1998), the court of appeals held that the failure of the trial court to award plaintiffs their attorneys' fees was an abuse of discretion.

In the instant case, the plaintiff class was clearly the prevailing party. In fact, given the *Beatty II* court's holding that MSD charges under Ordinance No. 8657 were illegal, the plaintiff's class' prevailing party status was preordained. The fact that the parties settled this case does not affect the plaintiff class' prevailing party status. *See e.g., Wirken v. Miller*, 978 S.W.2d 60, 64 (Mo.App. W.D. 1998) (stating that there is "no authority for the proposition that a case must be tried to conclusion before any party can claim to be a prevailing party"). In fact, in the only reported Hancock Amendment case interpreting the section 23's phrase "the applicable unit of government," the plaintiff was awarded attorney's fees even though the trial court dismissed its claim as moot. *Gilroy-Sims & Assoc. v. Downtown St. Louis Business District*, 729 S.W.2d 504 (Mo.App. E.D. 1987).

In *Gilroy-Sims & Associates,* the City of St. Louis created a special business district referred to as the St. Louis Downtown Business District. *Id.* at 506. The legislation creating the business district set an initial tax rate and the business district began levying the tax upon the taxpayers. *Id.* Citing a violation of the Hancock Amendment, the plaintiff filed suit to enjoin collection of the tax on the basis that it violated the Hancock Amendment's requirement in § 22 of voter approval. *Id.* Shortly after the plaintiff filed the lawsuit, the board of aldermen and mayor enacted new legislation that required taxpayer approval of the St. Louis Business District's tax levy. *Id.* After the taxpayers approved the tax, the trial court dismissed the plaintiff's Hancock Amendment claim as moot. *Id.* Because the plaintiff's lawsuit was the motivating factor in forcing the City of St. Louis to gain voter approval of the tax levy, the trial court labeled Gilroy-Sims as "prevailing parties in the spirit of Article X, § 23 of the Missouri Constitution." *Id.* at 507. On appeal, the *Gilroy-Sims* court upheld the plaintiffs' status as prevailing parties. Likewise, in the instant case, even though the parties have agreed to a settlement that unconscionably reduces the amount of illegal charges that MSD is refunding, MSD does have to disgorge some of its illegal charges and acknowledge, tacitly at least, that it violated Hancock Amendment. Because the plaintiff class is the prevailing party, the Hancock Amendment mandates that MSD bear the burden of paying the attorneys' fees.

Instead, the settlement agreement approved by the trial court shifts the attorneys' fees from MSD to the plaintiff class. In doing so, the settlement agreement contravenes the Hancock Amendment's mandate that the applicable unit of government pay the attorneys' fees. Moreover, as Henry Ordower, a professor of law at St. Louis University, noted in his affidavit filed on behalf of the Barnes-Jewish Class Members in this case, the settlement agreement's shift of attorneys' fees from the MSD to the plaintiff class provides a perverse incentive for MSD and similarly situated governmental entities to blithely ignore the Hancock Amendment's requirement and then to engage in recalcitrant litigation tactics to extract a favorable settlement.[6] (LF 320) MSD has had the use of the illegal funds for approximately seven years. Even if MSD invested the gross settlement amount conservatively, for example at the rate of five percent interest, it would have been enriched by no less than fifteen million dollars over seven years. The interest alone provides a powerful incentive for governmental bodies such as MSD to resist taxpayer enforcement efforts. (LF 320) The trial court's approval of this settlement sends precisely this message.

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[6] Appellants' attorneys have informed MSD that they do not object to the immediate disbursement of the net settlement amount since this amount is essentially uncontested.

The Respondents have repeatedly stressed the need for closure in this case. Plaintiffs' counsel testified regarding the laborious task of bringing MSD to task for the illegal charges. Plaintiffs' counsel is to be commended for initiating this litigation — it is precisely the mechanism envisioned by the Hancock Amendment to reign in overzealous governmental bodies. However, if this court affirms the trial court's approval of the settlement in its current form, all of the public benefit resulting from this litigation will be lost. By settling now, on these terms, the plaintiff class acquiesces to MSD's threats to unnecessarily prolong the litigation. Plaintiffs' counsel and MSD also urge approval of the settlement before additional eligible class members are lost from MSD's records. This argument should be rejected outright. MSD is, in effect, trying to hold the recovery of class members hostage to its threat of continued litigation. Allowing governmental bodies to advance this argument permits them to force settlement on their terms at the expense of the taxpayers. In the final accounting, the taxpayers have lost the use of approximately $40 million for seven years while MSD has been enriched by having these funds for seven years. The message to other governmental units will be clear: the Hancock Amendment is a hollow threat — even if a plaintiff class challenges an action, an aggressive litigation strategy will result in a beneficial settlement, one that leaves the violating government body enriched.

III. THE TRIAL COURT ERRED IN DENYING THE BARNES-JEWISH CLASS MEMBERS' MOTION TO INTERVENE BECAUSE INTERVENTION WAS WARRANTED PURSUANT TO MISSOURI SUPREME COURT RULE 52.12(A), THE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE BARNES-JEWISH CLASS MEMBERS HAD INTERESTS IN REFUND AMOUNTS THAT WERE SUBJECT TO THE CLASS ACTION SETTLEMENT, THEIR INTERESTS WERE IMPAIRED BY THE CLASS ACTION SETTLEMENT, AND THEIR INTERESTS WERE NOT ADEQUATELY REPRESENTED AS EVIDENCED BY THE UNFAIR DISCOUNT OF THEIR CLAIMS.

The Barnes-Jewish Class Members also appeal the trial court's denial of their motion to intervene.[7] The standard of review for an appellate court in reviewing the denial of a motion to intervene is that the judgment of a trial court denying a motion to intervene will be reversed if it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law *Long v. Seely*, 975 S.W.2d 208, 210 (Mo.App. E.D. 1998). To intervene as a matter of right, an intervenor must meet the following three requirements: (1) intervenor has an interest in the subject matter; (2) a disposition of the action may impede the ability of the intervenor to protect that interest; and (3) the intervenor's interests are not adequately represented by the existing parties. *Borgard v. Integrated Nat'l Life Ins. Co.,* 954 S.W.2d *532, 535* (Mo.App. E.D. 1997) *citing* Missouri Supreme Court Rule 52.12(a).

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[7] The Barnes-Jewish Class Members incorporate their Suggestions in Opposition to Respondents' Motions to Dismiss. As explained in the Suggestions, the Barnes-Jewish Class Members attempted to intervene in order to preserve appellate review of the class action settlement even though no Missouri precedent mandates that attempted intervention is necessary to preserve appellate review. In fact, persuasive authority from other jurisdictions indicates that the filing of objections by class members is sufficient to preserve appellate review of a class action settlement.

The first two elements are easily satisfied. The Barnes-Jewish Class Members had an interest in the recovery of the illegal wastewater charges that they paid pursuant to Ordinance No. 8657. The Barnes-Jewish Class Members filed objections to the class settlement (LF 263-67) and affidavits (LF 291-310; 315-16) regarding the Barnes-Jewish Class Members' payment and potential refund. Attorneys for the Barnes-Jewish Class Members were permitted by the trial court without objection from the plaintiffs or defendants to appear and cross-examine witnesses. Because the trial court conditionally certified the class on a non-opt out basis, the approval of this settlement extinguishes any further interest of the Barnes-Jewish Class Members in obtaining a refund.

The Barnes-Jewish Class Members' reasons for asserting inadequacy of representation are synonymous with their objections: namely, the settlement is not fair, reasonable, or adequate given the unjustified discount of the settlement amount, and the settlement violates the Hancock Amendment's requirement that the applicable government unit pay the plaintiffs' attorneys' fees. In this case, the issue of adequacy of representation is inextricably linked to the issue of whether the settlement was fair, reasonable, and adequate. *See e.g., White v. National Football League,* 41 F.3d 402, 408 (8th Cir. 1994) (stating that the "adequacy of class representation

. . . is ultimately determined by the settlement itself"). Clearly, the representation of the existing parties would be deemed inadequate if they acquiesced to an unreasonable or unconstitutional settlement.

IV. CONCLUSION

The trial court abused its discretion in approving a class action settlement that reduced plaintiffs' claim from approximately $69.2 million to *$25.6* million. The plaintiff class has direct Missouri Supreme Court precedent that supports its claim, and MSD has failed to forward any meritorious defense that would justify a $43.6 million reduction. The settlement agreement further violates the Hancock Amendment by shifting responsibility from the applicable unit of government and to the taxpayers.

The Barnes-Jewish Class Members submit that the refund payable to the customers of MSD should be the amount that MSD collected from its customers and held unlawful in *Beatty II* — $39.7 million — reduced by the amount credited back to delinquent account customers who, in effect received a full credit (refund) on their unpaid bill. In addition, interest accrued from July 15, 1993 at the statutory rate of 9% of the $38.3 million should also be paid. Such interest through April of year 2000 is approximately $30.9 million, so that the total refund to customers proposed by the Barnes-Jewish Class Members is as follows:

Principal amount to be refunded	$38.3 million
Interest at statutory rate of 9%	*$30.9 million*
TOTAL REFUND	$69.2 million

The settlement agreement would reduce this amount to *$25.6* million by disallowing any interest and by requiring payment of a $4.5 million attorneys' fee out of the customer's refund pool as follows:

Principal of customer refund	$38.3 million
Interest	$0.0 million
Less agreed reduction	*$ 8.2 million*
TOTAL	$30.1 million
Less Attorneys' fee	*$ 4.5 million*
TOTAL REFUND	$25.6 million
Difference	$43.6 million

The Barnes-Jewish Class Members respectfully request that this Court reverse the trial court's judgment approving the class action settlement and denying the motion to intervene and remand this case to the trial court for further proceedings.

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IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

NO. ED 77467

Consolidated with NO. ED 77469

ROBERT A. RING, 6024 WASHINGTON AVENUE, INC., CHAMP SPRING CO., KICKHAM BOILER AND ENGINEERING, INC., VIKING LODGE AND RESTAURANT, INC., APARTMENT EXCHANGE, INC., and MICHAEL F. KICKHAMM SR.,
Plaintiffs-Respondents

v.

THE METROPOLITAN ST. LOUIS SEWER DISTRICT,
a political subdivision and municipal corporation,
Defendant-Respondent

BARNES-JEWISH HOSPITAL, DAIMLER-CHRYSLER CORPORATION, EMERSON ELECTRIC CO., SSM HEALTHCARE, and UNITY HEALTH SYSTEM,
Appellants

and

MARK D. ROBERTS, STEVEN OBERG, and GRETCHEN WILLIAMS,
Appellants

On appeal from the Circuit Court
of the City of St. Louis
Cause No. 954-02764
The Honorable David A. Dolan, presiding

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MISSOURI CONSTITUTION

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MISSOURI STATUTES & RULES

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FEDERAL STATUTES & RULES

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III. POINTS RELIED ON

I. THE RESPONDENTS FAILED TO DEMONSTRATE THE FAIRNESS, ADEQUACY, OR REASONABLENESS OF A SETTLEMENT THAT REDUCES THE CLASS' CLAIM BY MORE THAN SIXTY PERCENT AND VIOLATES THE HANCOCK AMENDMENT BY FORCING THE PLAINTIFF CLASS TO PAY ATTORNEYS' FEES.

Knopke v. Knopke, 837 S.W.2d 907 (Mo.App. W.D. 1992)

State ex rel. Utility Consumers Council of Missouri. Inc. v. Public Service Com'n of Missouri, 602 S.W.2d 852 (Mo.App. W.D. 1980)

Beatty v. Metropolitan St. Louis Sewer District, 914 S.W.2d 791 (Mo. banc 1995)

Ring v. Metropolitan St. Louis Sewer District, 969 S.W.2d 716 (Mo. banc 1998)

Beatty v. Metropolitan St. Louis Sewer District, 867 S.W.2d 217 (Mo. banc 1993)

II. THE BARNES-JEWISH APPELLANTS HAVE STANDING TO APPEAL BECAUSE THEY COMPLIED WITH ALL POSSIBLE CONDITIONS FOR APPELLATE REVIEW IN THAT THEY FILED OBJECTIONS TO THE CLASS ACTION SETTLEMENT AND ATTEMPTED TO INTERVENE AS A PARTY.

State ex rel. Ashcroft v. American Triad Land Co., Inc., 712 S.W.2d 62 (Mo.App. E.D. 1986)

United States ex rel. Louisiana v. Jack, 244 U.S. 397, 37 S.Ct. 605, 61 L.Ed. 1222 (1917)

Marino V. Ortiz, 484 U.S. 301(1988)

Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993)

Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993)

Crawford v. Equifax Payment Services, Inc., 201 F.3d 877 (7th Cir. 2000)

State ex rel. St. Joseph, Mo. Ass'n of Plumbing. Heating, & Cooling Contractors. Inc. v. City of St. Joseph, 579 S.W.2d 804 (Mo.App. 1979)

State ex rel. Wolfner v. Dalton, 955 S.W.2d 928 (Mo. 1997)

State ex rel. Ashcroft v. American Triad Land Co., Inc., 712 S.W.2d 62 (Mo.App. E.D. 1986)

State ex rel. Strohm v. Board of Adjustment, 869 S.W.2d 302 (Mo. App. 1994)

I. THE RESPONDENTS FAILED TO DEMONSTRATE THE FAIRNESS, ADEQUACY, OR REASONABLENESS OF A SETTLEMENT THAT REDUCES THE CLASS' CLAIM BY MORE THAN SIXTY PERCENT AND VIOLATES THE HANCOCK AMENDMENT BY FORCING THE PLAINTIFF CLASS TO PAY ATTORNEYS' FEES.

A. *The Settlement Agreement is Unfair, Inadequate, and Unreasonable in Relation to the Strength of the Plaintiff Class Claim.*

Respondents[1] attempt to shift the focus from the plaintiff class' claim for the principal amount plus interest to the issue of class members who are not identifiable. The fact remains, however, that the class action settlement reduces the plaintiff class claim from approximately $69 million[2] to $25.6 million — a sixty-three percent reduction. (See Conclusion for calculation of these amounts.) Respondent-Plaintiff attacks this amount on the basis that it includes compounded interest. Under Missouri law, however, a trial court in an equity case has discretion whether to award compounded interest. *See Knopke v. Knopke*, 837 S.W.2d 907, 915 (Mo.App. W.D. 1992). Moreover, even if simple interest at the statutory rate of nine percent is calculated, the amount of interest accruing on the principal amount each year is more than $3.4 million and a staggering $24 million over a seven-year period. Even Respondent-Plaintiffs counsel conceded that a strong claim existed for obtaining interest at the rate of five percent per year — a total of more than $15 million — because MSD admitted that it obtained this return on its general deposits. (TR 105) In the instant case, all parties and the trial court were aware that MSD has held $40 million in reserves since 1993 to cover its liability for collecting the illegal tax. *See e.g.,* (LF 278).

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[1] "Respondents" refers to Respondent-Plaintiff and Respondent-MSD.

[2] Interest is calculated at the rate of nine percent and compounded yearly from July 15, 1993, the last date that MSD assessed the unconstitutional charges to the date of the Appellants' Brief. As of the current date, the total amount of principal and interest due is $70,422,168.76.

Respondents' argument that the settlement is fair because certain class members are unidentifiable and therefore could not recover is without merit. As explained above, the interest figures demonstrate that the settlement is unfair, inadequate, and unreasonable in light of the strength of the plaintiff class' claim. Respondent-Plaintiff's argument that unidentifiable class members have claims of approximately $10 million does not address the interest argument. (Pl. Br. at 46). Moreover, the record is devoid of any evidentiary support of the amount of claims possessed by unidentifiable class members. In any event, the structure of the settlement exacerbates the problem of unidentifiable class members. If a class member has moved to another location in MSD's service area since the illegal tax was collected, that class member does not automatically receive the settlement refund in the form of a credit. Rather, the class member must submit a claim to MSD. MSD, the only party with knowledge of its customers, presented no witness or evidence at the fairness hearing to establish the number of unidentifiable claim members. Nor did MSD explain why it could not simply credit customers who moved within its service area since 1993 instead of requiring them to submit claim forms.

Most importantly, the settlement agreement allows MSD to profit from its Hancock Amendment violation.

As MSD counsel's letter dated July 6, 1999 states, "In 1993, the MSD reserved $40,000,000 to cover the settlement and that money has been drawing interest since that time." (LF 278) By sacrificing the class' interest claim, MSD has been enriched by enacting and collecting the illegal tax. The approval of this settlement agreement provides a perverse incentive for MSD and similarly situated governmental entities to blithely ignore the Hancock Amendment's requirement and then to engage in recalcitrant litigation tactics to extract a favorable settlement.

The Barnes-Jewish Class Members' Brief details the weaknesses of MSD's defenses. (B-J App. Br. 12-1 4). MSD's defenses of unjust enrichment and set-off is without merit given the fact that MSD has held the funds in reserve since 1993. Moreover, MSD failed to present any evidence regarding its use of the illegal tax to benefit its customers. The laches defense is unpersuasive since plaintiff's class counsel filed suit within three days of the *Beatty III*[3] decision in which the Missouri Supreme Court suggested that a class action is the proper mechanism to obtain refunds for MSD's customers. Similarly, the language in the *Beatty III* and *Ring*[4] decisions regarding the propriety of a class action in this case eviscerates MSD's defense to certification of the class action.

Respondents also claim that the *Ring* decision only defeated MSD's sovereign immunity defense with respect to obtaining a refund of the principal amount. The language in *Ring*, however, contains no such limitation: "[W]e hold generally that article X, section 23, operates as a waiver of sovereign immunity and permits taxpayers to seek a refund of increased taxes previously collected by a political subdivision in violation of article X, section 22(a)." Further, Missouri law provides that a utility is required to pay interest from the date of unlawful collection. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Com'n of Missouri*, 602 S.W.2d 852 (Mo.App. W.D. 1980).

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[3] *Beatty v. Metropolitan St. Louis Sewer District*, 914 S.W.2d 791, 795 (Mo. banc 1995).

[4] *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716, 719 (Mo.banc 1998).

B. *The Objections of the Class Members to the Settlement Are Significant.*

Respondents portray the objections of the Barnes-Jewish and Roberts Class Members as insignificant. Respondent-Plaintiff cites the support of the Missouri Industrial Energy Consumers[5] ("MIEC") as evidence of the fairness of the settlement: "These are large corporations which have substantial claims, and are sufficiently sophisticated and knowledgeable to analyze the facts and the law. . . ." (Pl. Br. at 52). Respondent-Plaintiff, however, ignores the fact that the Barnes-Jewish Class Members are also comprised of some of MSD's largest hospital and industrial users. It is also significant that counsel for the Barnes-Jewish Class Members are filing their Entry of Appearance and Statement of Position of the Monsanto Company, one of the members of the MIEC who was granted amicus status. In its Statement of Position, Monsanto withdraws its support for the position taken by the other members of the MIEC and emphatically supports the objections and position of the Barnes-Jewish Class Members.

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[5] The MIEC, a group of MSD customers, is represented by Bryan Cave. MSD's brief acknowledges that one of the mediators of this settlement was a partner of Bryan Cave and that the same firm represents the MSD in certain matters.

Respondent-MSD argues that any assertion that the objections of individual industrial consumers should be given more weight than an individual residential consumer "smacks of arrogance." (MSD Br. at 31). Apparently, MSD would also discount the Respondent-Plaintiff's reliance on the MIEC. MSD, however, wholly misconstrues the position of the Barnes-Jewish Class Members. Plainly, these large industrial consumers have substantial claims and thus greater monetary stake in the case. Because industrial consumers have more at stake, they are likely to be more attentive and vigilant in assuring the fairness of a settlement. Such vigilance is in the interest of all class members.

C. *The Settlement Violates the Hancock Amendment.*

Finally, in response to the argument that the class action settlement violates Article X, § 23 of the Missouri Constitution because the settlement allows for the payment of attorneys' fees from the class settlement fund, respondents make the astounding assertion that MSD is really paying for the plaintiff class' attorneys' fees. (Pl. Br. at 62, MSD Br. at 34). The funds that MSD will disburse under the terms of the settlement agreement are not MSD's. As the Missouri Supreme Court definitively stated in *Beatty II*[6], the wastewater disposal charges that MSD collected from Ordinance No. 8657 were unconstitutional. MSD's partial refund of the illegal tax that it collected cannot be viewed as payment by MSD. The settlement agreement reduces MSD's obligation to refund the illegal tax and then further reduces the plaintiff class' recovery by forcing the class to pay for attorneys' fees in the amount of $4,521,000. Curiously, when MSD was facing the obligation of paying for attorneys' fees in the *Beatty* case, it vigorously opposed Respondent-Plaintiff counsel's request for attorneys' fees and argued that the proper amount of compensation was approximately $46,000. (LF 238-257). Now that the plaintiff class is paying the attorneys' fees, MSD has acquiesced to fees of $4,521,000.00. As explained on pages 14-19 of Barnes-Jewish Class Members' Brief, this class settlement violates the Hancock Amendment by forcing the class and not the applicable unit of government to bear the burden of plaintiff counsel's attorneys' fees.

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[6] *Beatty v. Metropolitan St. Louis Sewer District,* 867 S.W.2d 217, 218 (Mo. banc 1993).

II. THE BARNES-JEWISH APPELLANTS HAVE STANDING TO APPEAL BECAUSE THEY COMPLIED WITH ALL POSSIBLE CONDITIONS FOR APPELLATE REVIEW IN THAT THEY FILED OBJECTIONS TO THE CLASS ACTION SETTLEMENT AND ATTEMPTED TO INTERVENE AS A PARTY.

Respondent-MSD asserted that the Barnes-Jewish and Roberts Class Members did not have standing to appeal in a Motion to Dismiss filed prior to the parties' briefs. The Barnes-Jewish Class Members filed a nineteen-page brief of Suggestions in Opposition to MSD's Motion to Dismiss. Although MSD's brief simply incorporates the arguments it set forth in its Motion to Dismiss, the Respondent-Plaintiff's brief reargues all of the points raised by MSD. In the interest of brevity, the Barnes-Jewish Class Members incorporate their Suggestions in Opposition and will not reargue each point in this brief.

Respondent-Plaintiff concedes that the Barnes-Jewish Class Members have standing to appeal the denial of their motion to intervene. (Pl. Br. at p. 29). *See e.g., State ex rel. Ashcroft v. American Triad Land Co.. Inc.,* 712 S.W.2d 62, 64 (Mo.App. E.D. 1986) (stating that "[a]ppellants have the right to appeal from the denial of their motion to intervene"). This irrefutable statement of Missouri law undermines the Respondents' standing argument. In the instant case, the Barnes-Jewish Class Members, as objecting members of a non-opt out class, sought intervention to prevent the approval of an unfair and unconstitutional class action settlement. Thus, the determination of whether the trial court erred in denying the Barnes-Jewish Class Members' Motion to Intervene is clearly interwoven with the determination of whether the trial court erred in approving the class action settlement.

A. *Missouri Law is Silent As to Whether Objecting Class Members Must Attempt Intervention to Have Appellate Standing.*

As explained in the Suggestions in Opposition to Motion to Dismiss, no Missouri authority requires that attempted intervention is a prerequisite to appellate standing. In fact, federal courts are divided on this very issue. Respondent-Plaintiff's brief attempts to argue that a difference exists between Missouri and federal authority regarding whether only a party may appeal. However, as the United States Supreme Court noted, the rule that only parties to a lawsuit have appellate standing in federal courts is well settled. *United States ex rel. Louisiana v. Jack,* 244 U.S. 397, 402, 37 S.Ct. 605, 607, 61 L.Ed. 1222 (1917); *see also,* Fed. Rule App. Proc. 3(c) ("The notice of appeal shall specify the *party or parties* taking the appeal") (emphasis added). Thus, those federal courts that have allowed unnamed class members to appeal without attempting to intervene have not done so because federal appellate standing requirements differ from Missouri's. Instead, they have recognized that unnamed class members are, in a sense, putative parties: unnamed class members, especially in the context of a non-opt out class, have an intrinsic stake in the litigation.

Respondent-Plaintiff erroneously asserts that the United State Supreme Court "laid the controversy to rest" in *Marino v. Ortiz*, 484 U.S. 301(1988). (Pl. Brief at p. 30). The petitioners in *Marino* were not unnamed class members; they were non-parties who had not attempted to intervene. *See* 484 U.S. at 587. Once again, a crucial distinction exists between nonparties, who do not have a patently obvious interest in the litigation, and unnamed class members, who by their status as class members have an intrinsic stake in the litigation. Following the *Marino* decision, the Third Circuit employed this reasoning and held that *Marino* does not require unnamed class members to formally intervene in order to have appellate standing. *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993). Thus, contrary to Respondent-Plaintiff's assertion, the pre-*Marino* cases holding that intervention is not required remain valid and persuasive authority. *See e.g., Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977)

B. *The Barnes-Jewish Class Members' Motion to Intervene Satisfied the Prerequisites to Intervention.*

Having urged this Court to adopt a strict rule that intervention is necessary to confer appellate standing on unnamed class members, Respondent-Plaintiff then urges this Court to require unnamed class members to comply with standards that would make intervention virtually impossible. In those jurisdictions that do require intervention as condition to appellate standing, it is recognized that intervention is merely a formality to preserve appellate review. For example, even if the trial court had allowed the Barnes-Jewish Class Members to intervene, they would have had no greater rights than those they exercised by objecting to the proposed settlement. *See e.g., Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 881 (7th Cir. 2000) (noting that an objecting intervenor cannot prevent the approval of a class action settlement; only the class representative's assent is necessary). As a result, the respondents cannot possibly claim any prejudice as to the timing or nature of the Barnes-Jewish Class Members' attempted intervention. Not surprisingly, jurisdictions that require unnamed class members to intervene are very permissive in granting interventions. As the *Crawford* court noted, "Because only parties may appeal, it is vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision."

1. *The Barnes-Jewish Class Members Satisfied Rule 52.12(c)*

Respondent-Plaintiff alleges that the Motion to Intervene was ineffective because a pleading was not attached. Rule 52.12(c) states that the Motion to Intervene shall be accompanied by a pleading (not necessarily a petition). To the extent that a pleading was required, the Barnes-Jewish Class Members incorporated their Objections filed on October 25, 1999. (SLF 4). The Objections clearly set forth the Barnes-Jewish Class Members' intervention claim: namely, that the settlement was not fair, reasonable, or adequate and that it violated the Missouri Constitution.

In any event, Missouri case law indicates that technical compliance with the rule is not necessary in some cases.. *See State ex rel. St. Joseph, Mo. Ass'n of Plumbing, Heating, & Cooling Contractors, Inc. v. City of St. Joseph*, 579 S.W.2d 804, 806 (Mo.App. 1979) (stating that in "Missouri, the general rule has always been that the statute should be liberally construed to permit broad intervention"). Respondent-Plaintiff asserts that "dictum" in the *City of St. Joseph* case cannot overrule the holding of *State ex rel. Wolfner v. Dalton*, 955 S.W.2d 928 (Mo. 1997). Curiously, however, the proposition that Respondent-Plaintiff cites in *Wolfner* case is dictum itself. In *Wolfner*, the issue was whether a trial court could enter an order, such as one approving intervention, thirty days after a consent judgment had been entered. Wolfner did not overrule the general Missouri rule referenced in the *City of St. Joseph* case that construes statutes broadly to allow intervention.

Apparently, Respondent-Plaintiff is advocating a position that would require unnamed class members to attach a petition that asserts a different cause of action than the class. Reduced to its essence, this position would make it virtually impossible for unnamed class members to intervene and obtain appellate review of class action settlements. Most unnamed class members do not desire to assert a cause of action different from the plaintiff class. Instead, unnamed class members desire to intervene to challenge the adequacy, reasonableness, and fairness of a settlement. Thus, the trial court would have gained nothing by requiring the Barnes-Jewish Class Members to attach a Petition that recited the plaintiff class' cause of action verbatim.

2. *The Barnes-Jewish Class Members Stated a Claim for Intervention and Proved the Requisite Facts.*

The main argument Respondent-Plaintiff raises is that the Barnes-Jewish Class Members cannot prove that they were not adequately represented. If, as the Barnes-Jewish Class Members contend, the settlement agreement was not fair, reasonable, or adequate and violated the Missouri Constitution, then they were not adequately represented. As for proving the requisite facts, the Respondent-Plaintiff concedes that the Barnes-Jewish Class Members filed an affidavit, without objection at the fairness hearing, that establishes their interest in the lawsuit. (Pl. Br. at p. 37

3. *The Motion to Intervene was Timely.*

The Barnes-Jewish Class Members filed their Motion to Intervene in a timely manner. Respondent-Plaintiff contends that because counsel for the Barnes-Jewish Class Members was aware of this case, they should have intervened sooner. As the *Crawford* court noted, "Unnamed members of the class rarely will suspect a shortfall in the adequacy of representation before learning the terms of a (potentially inadequate) settlement. . . ." 201 F.3d at 881. In the instant case, the Barnes-Jewish Class Members filed their Motion to Intervene within three months of the trial court's certification of the mandatory, non-opt-out class. Next Respondent-Plaintiff contends that an application subsequent to trial is not timely unless "substantial justice mandates otherwise." (MSD Memo. at p. 4, *citing State ex rel. Ashcroft v. American Triad Land Co. Inc.,* 712 S.W.2d 62, 64 (Mo.App. E.D. 1986). Contrary to Respondent-Plaintiff's assertion, however, the "trial" in this case had not occurred.

The Barnes-Jewish Class Members filed their motion well within the deadline imposed by this Court for the filing of post-hearing matters. (TR 162-63). In fact, the trial court's order indicates that it examined the Motion to Intervene on its merits and did not rule that it was untimely.[7] In any event, substantial justice would require that an intervening party with an interest in the case be allowed to intervene to prevent an unreasonable and unconstitutional settlement.

Finally, Respondent-Plaintiff cites *State ex rel. Strohm v. Board of Adjustment*, 869 S.W.2d 302, 304 (Mo. App. 1994) for the proposition that allowing persons who wish to block a settlement to intervene in the late stages of a case would prejudice the settling parties. Respondent-Plaintiff misapprehends the nature of intervention in the class action context. The *Strohm* case did not involve a class action and is therefore irrelevant. Unlike an intervening party in a non-class action case, an unnamed class member cannot block a class action settlement. Only the assent of the class representative is essential to a settlement. *Crawford*, 201 F.3d at 881. As explained above, the sole function of intervention in the class action context is preserving appellate review. The only "prejudice" that the respondents could experience is that this Court of Appeals would find merit to the present appeal. As the *Crawford* court noted, "The possibility that we would see merit to their appeal cannot be called 'prejudice'." *Id.*

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[7] The Court in this Order and judgment *after considering the same,* overrules those motions" (emphasis added). (LF 330, referencing all of the Barnes-Jewish Class Members' pending motions).

III. CONCLUSION

This case involves an unregulated governmental entity that functions as a public utility that provides storm water and sanitary services to over 400,000 customers and affects every home, hospital and business in the greater St. Louis Missouri area. It is a case of the greatest public interest. In 1992 a proposed MSD $40 million rate increase was challenged by certain customers. After vigorous opposition by the MSD, the Missouri Supreme Court in the 1993 *Beatty II* decision sustained the challenge and held the rate increase to be a tax imposed in violation of the Hancock Amendment. Despite this clear holding, MSD refused to refund the illegally collected rate increase and commenced a campaign of vigorous opposition to any refund obligation. Ultimately, the Missouri Supreme Court issued the *Beatty III* decision suggesting the appropriate remedy for refunding the unlawfully collected funds. At this point the prosecution of a class action suit was all that was required to achieve the customer refund.

It is the position of the Appellants that the refund to the customers should be the amount of $70,422.168 consisting of:

Principal of the Refund	39,304,374
Interest at the Statutory Rate of 9% through July 31, 2000	*32,117,794*
Total Refund	70,422,168

No provision is made for customer payment of attorney fees as the Hancock Amendment requires the governmental equity to negotiate and pay such fees.

Under the settlement approved by the trial court, the $70 million customer refund is reduced to $25.6 million, as follows:

Reduced Principal of Refund	530,140,000
Interest	0
Less Attorney's Fees	*$ 4,521,000*
Total Refund	$25,619,000

The Barnes-Jewish Class Members contend that the reduction of the plaintiff class' claim from $70 million to $25.6 shocks the conscience and is not fair, reasonable, or adequate. For these reasons, the Barnes-Jewish Class Members respectfully request that this Court reverse the trial court's judgment approving the class action settlement and denying the Motion to Intervene and remand this case to the trial court for further proceedings.

Respectfully submitted,

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IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT
STATE OF MISSOURI

Cause No. 954-02764A

Division 3

ROBERT A. RING, et al.,
Plaintiffs,

vs.

THE METROPOLITAN ST. LOUIS
SEWER DISTRICT,
Defendant.

DISSENTING CLASS MEMBERS' RESPONSE TO PLAINTIFFS' OPPOSITION TO DISSENTING CLASS MEMBERS' MOTION TO INTERVENE

COME NOW Barnes-Jewish Hospital, DaimlerChrysler Corporation, Emerson Electric Company, SSM Healthcare, Unity Health System and Solutia, Inc. (hereinafter referred to as the "Dissenting Class Members"), by and through counsel, and file this brief response to Plaintiffs' Memorandum in Opposition to Dissenting Class Members' Motion to Intervene. The Dissenting Class Members state as follows:

I. Adequacy of Representation

Plaintiffs assert that the Dissenting Class Members' interests are aligned with the class representatives because both desire to recoup the unconstitutional wastewater disposal charges from MSD. As explained in the Dissenting Class Members' Motion to Intervene and Post-Trial Memorandum, the interests of the class plaintiffs and the Dissenting Class Members sharply diverge over the reasonableness of the settlement amount. By structuring the class action settlement as a non-opt out version, the Class plaintiffs are attempting to force the Dissenting Class Members to accept an unreasonable settlement. For example, Plaintiffs relinquish all claims to prejudgment interest; the Dissenting Class Members believe that MSD must refund prejudgment interest in the amount of approximately $22 million. Plaintiffs accept a discount of the settlement amount from approximately $40 million to *$25.5* million; the Dissenting Class Member vigorously oppose such a reduction. Finally, Plaintiffs ignore the Hancock Amendment and allow MSD to pay the attorneys' fees out of the settlement fund; the Dissenting Class Members demand that the "applicable unit of government," and not the taxpayers, pay the attorneys' fees. As these divergent positions indicate, Plaintiffs are not adequately representing the interests of the Dissenting Class Members whose positions are directly adverse to the Plaintiffs.

II. Timeliness of Motion to Intervene

Plaintiffs contend that the Motion to Intervene was not filed in a timely manner. Plaintiffs then argue that, in any event, the Dissenting Class Members were not required to intervene to present their objections at the fairness hearing.

Contrary to plaintiffs' assertion, the "trial" in this case has not occurred. The Dissenting Class Members filed their motion well within the deadline imposed by this Court for the filing of post-hearing matters. Under Missouri law, there is no specific limit on the time nor the stage of the proceeding when an application to intervene must be made. *Estate of Witt,* 880 S.W.2d 380, 382

(Mo.App. W.D. 1994). The timeliness of a motion to intervene depends upon the posture of the case, and the balancing of all factors bearing upon the question. *Id.*

In the instant case, none of the parties are prejudiced by the Dissenting Class Members' filing of the Motion to Intervene on November 22, 1999. Plaintiffs concede that the Dissenting Class Members were able to participate fully in the hearing without intervening. By filing the Motion to Intervene at this time, the Dissenting Class Members are simply seeking additional procedural safeguards to protect their interests. Because none of the parties are prejudiced by the filing of the motion, this Court should consider the Motion to Intervene on its merits.

Furthermore, it is the position of the Dissenting Class Members that the environment in which the settlement negotiations were conducted appears to serve the interests of MSD and Plaintiffs' attorneys, but unfortunately not the interests of the public. Clearly a reduction of the refund amount from $62 million to *$25.5* million fails the fairness test on its face and, we submit, dooms the proposed settlement.

III. Pleading Demonstrating Claim or Defense for Which Intervention is Sought

Plaintiffs next contend that the motion is defective because it was not accompanied by a petition setting forth the claim or defense for which intervention is sought. While Rule 52.12(c) states that the motion shall be accompanied by a pleading (not necessarily a petition), Missouri case law indicates that technical compliance with the pleading requirement may be excused. See *State* ex *rel. St. Joseph, Mo. Ass'n of Plumbing, Heating, and Cooling Contractors, Inc. v. City of St. Joseph,* 579

S.W.2d 804, 806 (Mo.App. 1979). The instant case is an example of why technical compliance with rule is not necessary. The Dissenting Class Members do not have a legal cause of action against MSD different from the one already set forth in the Plaintiffs' First Amended Petition. Instead, the Dissenting Class Members are attempting to intervene to safeguard their interests in the context of a class action settlement that is blatantly unfair. The filing of a petition repeating the allegations already set forth in the Plaintiffs' First Amended Petition would not aid the Court in ruling on the motion.

Plaintiffs' assert that without this petition, the Court cannot evaluate the Dissenting Class Members' claim for intervention. The Dissenting Class Members, however, have made their bases for intervention abundantly clear — both in the motion itself and Objections filed with this Court. To the extent that the Court determines that it is necessary for the Motion to Intervene to be accompanied by a pleading, the Dissenting Class Members hereby incorporate their Objections filed on October 25, 1999 with their Motion to Intervene.

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Plaintiffs,

vs.

THE METROPOLITAN ST. LOUIS
SEWER DISTRICT,
Defendant.

DISSENTING CLASS MEMBERS' OBJECTIONS TO PROPOSED SETTLEMENT

COME NOW Barnes-Jewish Hospital, Daimler-Chrysler Corporation, Emerson Electric Company, SSM Healthcare, Unity Health System, and Solutia, Inc. ("Dissenting Class Members") all of whom are consumers served by the Metropolitan Sewer District of St. Louis (MSD) and, pursuant to Implementing Order, entered by this Court in the above captioned matter on or about August 27, 1999, file the following objections to the proposed settlement of this matter.

INTRODUCTION

These objections, if sustained by this court, will produce an additional refund of approximately $30 million to Missouri consumers, over and above the approximately $25 million refund proposed by the MSD and attorneys for the customer class in this settlement.

This case and the related principal case, *Beatty v. Metropolitan St. Louis Sewer District,* 867 S.W.2d 271

(Mo. banc 1993) *("Beatty II")* arose as a constitutional challenge of a tax increased enacted by the MSD in May 13, 1992, as expressly authorized under the Hancock Amendment to the Missouri Constitution. Mo. Const., Art. X. On December 21, 1993, the Missouri Supreme Court issued the *Beatty II* decision holding that the tax increase enacted by the MSD was in violation of the Hancock Amendment and remanded the case to the St. Louis City Circuit Court. Following further litigation, and at the suggestion of the Missouri Supreme Court in *Beatty v. Metropolitan St. Louis Sewer District,* 914 S.W.2d 791 (Mo. banc 1995) *("Beatty lI")* issued on December 19, 1995, counsel for the challengers initiated a class action suit for the purpose of creating an appropriate legal basis to obtain refunds for all customers of the MSD who paid the unlawful tax increase. In this Court's August 27, 1999 Implementing Order, a customer class has been certified which includes all customers of the MSD who paid the unlawful tax increase.

The liability of the MSD for the amount of the tax increase is based upon Missouri Supreme Court's *Beatty II* and the Hancock Amendment to the Missouri Constitution. The liability of the MSD to pay interest on the unlawful tax increase is based upon Mo. Rev. Stat. § 408.020 (1998) of the Missouri statutes. These objectors approximate the total refund payable to customers of the MSD, in this proceeding as follows:

Hancock Refund	$40 million,
Interest	*$15 million,*
Total	$55 million

The Proposed Class Settlement filed herein by the attorneys for MSD and the original plaintiffs in the

Beatty case and for the customer class in the present class action proceeding provides for a fee of $4.5 million for the class attorneys, discounts the principal amount of the refund by approximately $9.5 million, and fails to provide for payment of prejudgment interest of approximately $15 million. Thus, the Dissenting Class Members urge the MSD to proceed with the refund of the undisputed amount, which is approximately $25 million. There is no reason not to refund this amount to the present customers.

1. THE PROPOSED SETTLEMENT IS CONTRARY TO MISSOURI LAW

The proposed settlement amount of $30,140,000 ignores the constitutional refund requirement and reflects an unlawful and unfair reduction of approximately $10 million of the unlawful tax collected by defendant. The Missouri Constitution clearly requires the refund of the MSD to its customers of the full amount of the unlawful tax increase without diminution of any kind including by compromise, settlement, or attorney's fees.

It is interesting to note that the MSD itself had established a reserve for the full amount of the refund and further, had credited delinquent accounts with the full amount of their respective share of the refund without reduction of any kind.

2. PREJUDGMENT INTEREST

The proposed settlement amount fails to mention, must less reflect defendants' liability for prejudgment accrued interest. Pursuant to Mo. Rev. Stat. § 408.020 (1998), defendants are potentially liable for an additional amount in excess of approximately $15,000,000.00, based on a demand made December 1995, the date of the commencement of this action, and based on the clear, liquidated amount at issue in this case.

3. ATTORNEY'S FEES

While the Dissenting Class Members, at this time, do not specifically challenge the $4.5 million fee award claimed plaintiffs' attorneys in this case, the Dissenting Class Members object to payment of an award of attorneys' fees from the common settlement fund. The Missouri Constitution requires a full refund of the amount of the unlawful tax. Section 408.020 of the Missouri statutes requires interest at a rate if 9%. The Missouri Constitution specifically contemplates that these expenses be imposed separately upon the "applicable unit of government," in this case, the State of Missouri. MO. CONST. art. X, § 23.

The Dissenting Class Members incorporate herein by reference their Memorandum of Law in support of these objections filed herewith.

WHEREFORE, the Dissenting Class Members respectfully file these objections and request this Court to reject the proposed class settlement and for such other and further relief as the Court deems appropriate.

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Certificate of Service

A true and accurate copy of the DISSENTING CLASS MEMBERS' OBJECTIONS TO PROPOSED SETTLEMENT was served by hand delivery and first class United States mail, postage prepaid, this 25th day of October, 1999 upon the following individuals:

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